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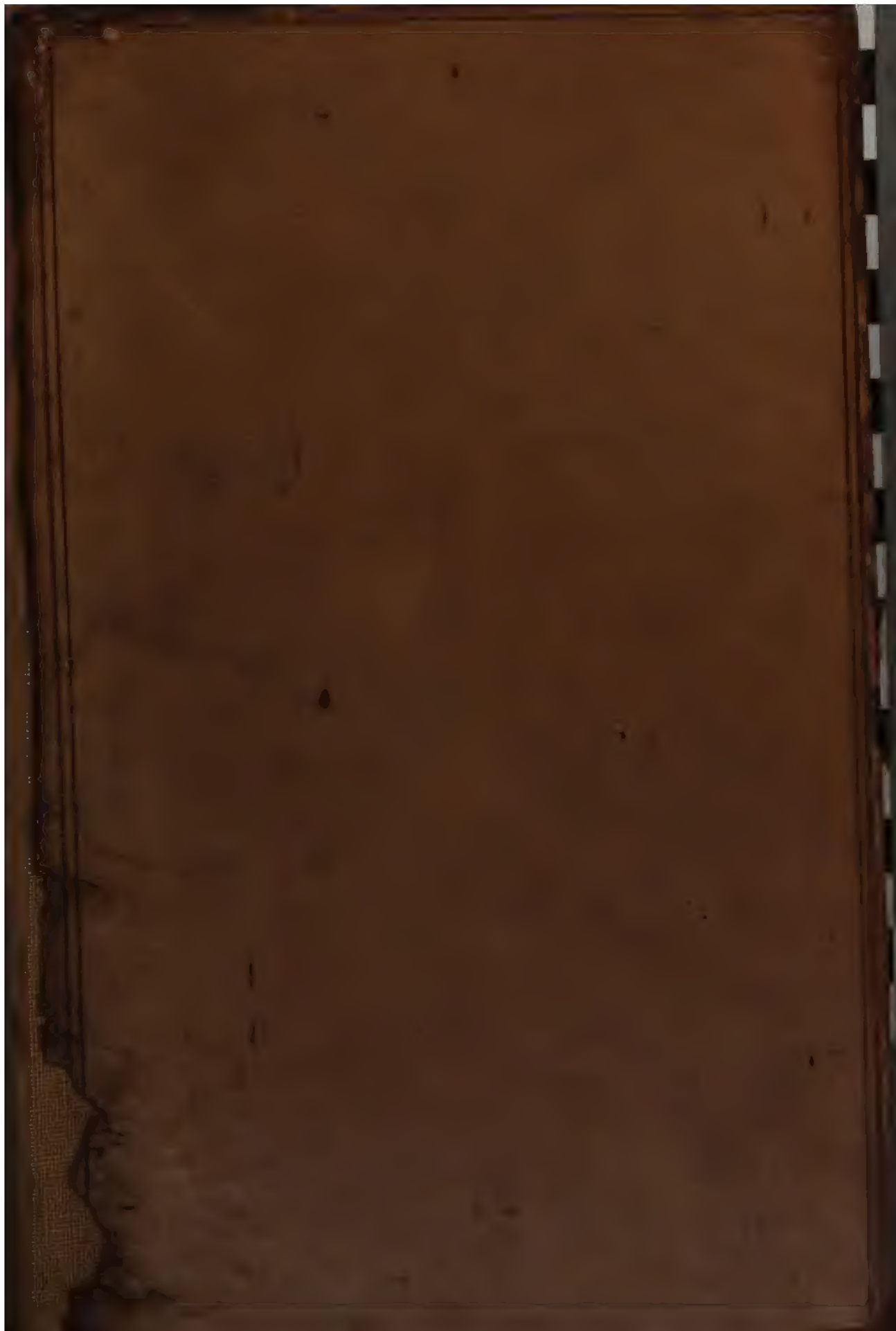
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THE
EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. VII.

MICHAELMAS TERM, 15 VICT. TO TRINITY TERM, 15 VICT.
BOTH INCLUSIVE.

BY

W. N. WELSBY, OF THE MIDDLE TEMPLE,
E. T. HURLSTONE, } AND { J. GORDON,
OF THE INNER TEMPLE, } OF THE MIDDLE TEMPLE,
ESQUIRES, BARRISTERS-AT-LAW.

L O N D O N :

S. SWEET, W. MAXWELL, AND V. & R. STEVENS & G. S. NORTON,
Law Booksellers and Publishers.

HODGES & SMITH, GRAFTON STREET, DUBLIN.

1853.

JUDGES
OF THE
COURT OF EXCHEQUER.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir Frederick Pollock, Knt, Chief Baron.

BARONS.

The Right Honourable Sir James Park, Bart.
Sir Howard Lang, Knt.
Sir Thomas Jordan, Bart.
Sir Samuel Martin, Bart.



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Sir EDWARD HALL ALDERSON, Knt.
Sir THOMAS JOSHUA PLATT, Knt.
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ATTORNEYS-GENERAL { **Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.**
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SOLICITORS-GENERAL { **Sir WILLIAM PAGE WOOD, Knt.**
Sir FITZROY KELLY, Knt.

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MICHAELMAS TERM, 15 VICT.

PERCIVAL v. NANSON and Others.

1851.

Nov. 5.

TRESPASS for seizing, cutting, and damaging certain nets of the plaintiff.

The defendants pleaded several pleas of justification, stating in substance that the Earl of Lonsdale was possessed of a certain close called "Solway Frith;" and because the said nets were wrongfully therein incumbering the same, and doing damage therein to the said Earl, the defendants, as his servants and by his command, seized the nets, and necessarily a little damaged the same.—Replications, *de injuriâ*.

At the trial, before *Williams, J.*, at the last Carlisle Summer Assizes, the defendants, in order to prove the title of the Earl of Lonsdale to the close in question, tendered in evidence the following entries in a book containing a deceased receiver's accounts, and produced from the custody of the Earl.

On an issue as to the right of L. to a certain fishery, entries of a deceased receiver, charging himself with the receipt of rent from a sub-receiver, due from certain persons (of whom the sub-receiver was one) for fixing a net in the fishery, are evidence in support of L.'s right.

1733.	£	s.	d.
Aug. 11th. Received of Mr. Thos. Hodgson in 55 <i>l.</i> 3 <i>s.</i> 6½ <i>d.</i>			
and in his half-year's salary 20 <i>s.</i> in all, on account			
for Drumburgh tenants' rents for half a year at			
Pent. last, (whereof 15 <i>l.</i> 8 <i>s.</i> 2 <i>d.</i> are customary, and			
40 <i>l.</i> 15 <i>s.</i> 4½ <i>d.</i> free rents)	56	3	6½

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 {
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£ s. d.

Received also of him a year's rent due from Farmer,
 of Drumburgh demean, and himself, as owner of
 Plumtrees and Bewleys tenements in Easton, for
 y^e liberty of fixing a raise net in Solway Frith in
 year 1732, at 6s. 8d. each share

1 0 0

1734.

Sept. 30th. Received of Mr. Thos. Hodgson y^e respec-
 tive shares due from 3 proprietors of y^e raise net set
 in y^e Solway Frith in Drumburgh in y^e year 1733

1 0 0

1735.

Sept. 30th. Received of Mr. Thos. Hodgson, being y^e
 respective shares of 6s. 8d. each due from y^e two
 owners of Bewleys and Plumtree tenements in East-
 on for fixing a raise net in Solway Frith in y^e year
 1734

0 13 4

It was objected, on the part of the plaintiffs, that the
 two last entries were not admissible as evidence of the
 facts stated in them, inasmuch as they merely contained a
 statement of what the sub-receiver told his principal re-
 specting the parties who paid rent, and the account on
 which it was paid. The learned Judge, however, admitted
 the documents in evidence, and a verdict was found for the
 defendants.

Watson now moved to set aside the verdict, and for a
 new trial, on the ground of the improper reception of this

therefore, are merely evidence that the sums were received by him as receiver. [*Parke, B.*—If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of that fact, as between third persons, after his death. Upon that principle it was decided in *Higham v. Ridgway* (a), that an entry made by a midwife of having delivered a woman of a child on a certain day, and for which her charge was paid, was evidence of the age of such child. *Alderson, B.*—In the case of an attorney's bill, a charge for serving a notice on A. B. would, after the attorney's death, be evidence of a service, although perhaps it was effected by the attorney's clerk. *Pollock, C. B.*—If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement; but if the entry is merely an act done in the course of a man's duty, then it is confined to matters within that duty.] The first of the receipts is not objected to, as part of the rent therein mentioned appears to have been paid by the principal receiver himself. [*Parke, B.*—In *Davies v. Humphreys* (b), it was argued, that although the indorsement on the note was evidence of the payment of the money, yet it was not evidence to shew for whom the money was originally advanced; but the Court held otherwise.]

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POLLOCK, C. B.—There ought to be no rule. I cannot understand why one of these documents should be receivable in evidence, and not the other two also. The first contains an entry that rent was received from Hodgson; and the other two are to the same effect; they relate to rent received from him in the two following years. The case of *Davies v. Humphreys* is an authority in point.

(a) 10 East, 109.

(b) 6 M. & W. 153.

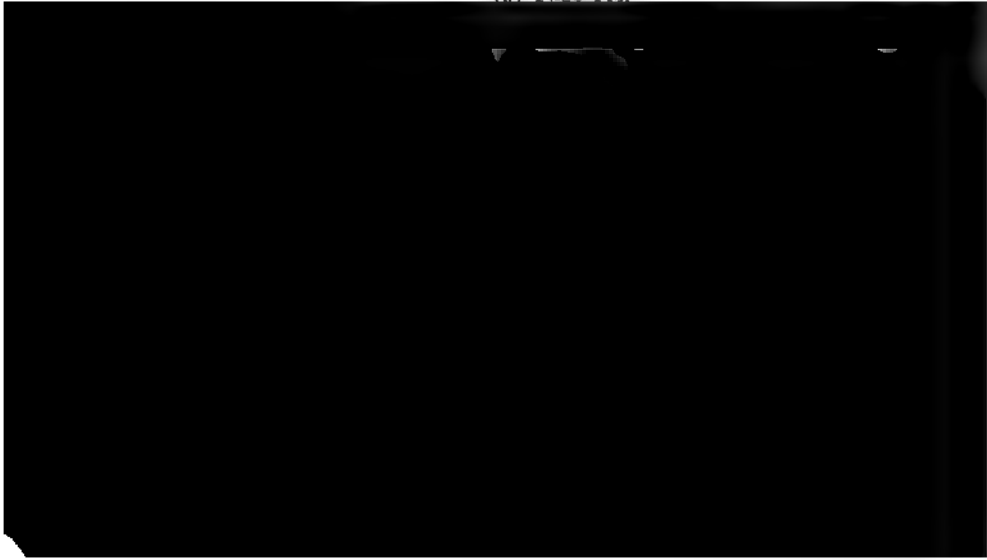
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PARKE, B.—It is not necessary to consider whether these entries would have been admissible, if they had merely contained a statement that the money was received on account of third persons. In all probability they would, on the authority of *Davies v. Humphreys*, and other cases collected in *Taylor on Evidence* (a). That, however, it is unnecessary to decide; because, if these entries be looked at, it is clear that Hodgson paid on three occasions for the liberty of fixing a net, enjoyed by himself and others; that is, upon one occasion he paid the whole rent, and upon the two other occasions he paid also for the shares of his copartners. Therefore, these documents were clearly admissible in evidence. But I am by no means prepared to say, that if the payment had been on account of a third person only, they would not have been evidence against that third person of such payment, on the principle that receipts are evidence not only of the fact of payment having been made, but also of the account on which it was made. In this case, however, the entries are so connected, that if one is admissible in evidence, the whole are admissible.

ALDERSON, B., and PLATT, B., concurred.

Rule refused.

(a) Page 443.



1851.

Nov. 19.

COLLINS and Another v. THE SOUTH STAFFORDSHIRE
RAILWAY COMPANY.

DEBT.—The declaration stated, that, before and at the time of the making of the agreement hereinafter mentioned, the defendants were a corporation established and incorporated by Act of Parliament for the purpose of making a railway called “The South Staffordshire Railway;” that the plaintiffs were possessed of and interested in certain lands or hereditaments more particularly described and referred to in the schedule written under the agreement; that the said lands or hereditaments were required by the defendants; and they the defendants were, by the statutes in that case made and provided, duly authorised to take the said lands or hereditaments in which the plaintiffs were so interested for the execution of the said railway; that the defendants had, for the purpose of making and executing the said railway or works, taken possession of the said lands or hereditaments in which the plaintiffs were so interested as aforesaid, and in respect of which the plaintiffs were, by reason of the same having been so taken possession of by the defendants, entitled to compensation or satisfaction from the defendants; but the defendants, before or at the time of the making of the agreement, had not made any satisfaction to the plaintiffs for their interest in the said lands or hereditaments so taken by the defendants, either under the provisions of “The Lands Clauses Consolidation Act, 1845,” or of the special Acts of Parliament relating to the South Staffordshire Railway Company, or any Act incorporated therewith or otherwise; and the plaintiffs claimed for such compensation from the defendants a sum of money exceeding the sum of 50*l.*, to wit, the sum of 900*l.*, of which the defendants at the time of the making of the agreement had notice. And thereupon, to wit, on &c., an agreement was made and entered into by and between the

Where parties agree to refer, in pursuance of the arbitration clauses of the 8 & 9 Vict. c. 18, a question of disputed compensation for land required by a Railway Company, and the appointment of an arbitrator on the part of the Company is signed by their secretary, an award made under that submission is valid, notwithstanding all the preliminary forms required by the statute have not been complied with, those forms being only necessary where the arbitration is compulsory.

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plaintiffs and the defendants, as follows, that is to say:—

“Whereas the hereditaments described or referred to in the schedule hereunder written are required and are authorised to be taken for the purposes of the South Staffordshire Railway Company, who are a corporation established and incorporated by several Acts of Parliament, &c., [setting out the titles of the Acts]; and whereas Thomas Collins and Thomas Churchill, of &c., are tenants from year to year in possession of the said hereditaments; wherefore the said Company, in obedience to the directions in this behalf of The Lands Clauses Consolidation Act, 1845, which is incorporated in the several hereinbefore-mentioned Acts respectively, duly gave to and served upon them the said T. Collins and T. Churchill a notice in writing, dated the 22nd day of August, 1848, that the said hereditaments were required for the purposes of the said railway, and of the intention of the said Company to take the same; and whereas the said T. Collins and T. Churchill, by a notice in writing under their respective hands, bearing date the 8th day of September, 1848, and addressed to and duly served upon the said Company, claimed as compensation in respect of their interest in the said hereditaments the sum of 900*l.*, and they thereby signified their desire to have such claim for compensation settled by arbitration in the manner mentioned in and for such case made and pro-

ton, of &c., surveyor. Now therefore be it known, that, in pursuance of and obedience to the directions of the said Lands Clauses Consolidation Act, 1845, in this behalf, the said Railway Company and the said T. Collins and T. Churchill do, and each of them doth, by this appointment in writing under the respective hands of Horatio Barnett, the secretary of the said Company, and of the said T. Collins and T. Churchill, nominate and appoint the said D. Houghton to be the single arbitrator to whom the said recited dispute shall be referred, and who shall accordingly by his award determine what consideration or other sum or sums of money is or are the value and shall be paid by the said South Staffordshire Railway Company for the unexpired term or interest of the said T. Collins and T. Churchill of and in the said hereditaments, and for any just allowances which ought to be made to them, and for any loss or injury they may sustain in respect of the said hereditaments by reason of the exercise of all or any of the powers of The Lands Clauses Consolidation Act, 1845, or the several hereinbefore-mentioned Acts, or any or either of them, or any Act incorporated therewith.—In witness whereof the said T. Collins and T. Churchill, and also the said H. Barnett, as such secretary, have hereunto set their hands, the 18th day of June, 1849. Thomas Collins, Thomas Churchill, and Horatio Barnett.” [The declaration then set out the schedule, and averred the identity of the parties to the agreement with the plaintiffs and defendants in this action.]—Averments, that the agreement was signed and executed by the said H. Barnett, the secretary of the Company, for or on behalf of the Company; that the said D. Houghton, in pursuance of the powers contained in the agreement, having taken upon himself the burden of the arbitration, did, in due manner and in pursuance of the powers vested in him by the agreement, and within three calendar months from the time he was so appointed arbitrator, and in accordance with the provisions of The Lands

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Clauses Consolidation Act, 1845, to wit, on the 10th day of August, 1849, duly make and publish his award in writing, under his hand and seal, of and concerning the matters in difference between the plaintiffs and defendants &c.; and, after reciting the said agreement, did by his said award then award, arbitrate, and determine, that the sum of 288*l.* should be paid by the defendants to the plaintiffs for the purchase of their estate and interest in the said lands, buildings, and premises, and in full of all other claims and demands which the plaintiffs might have or be entitled to claim against the defendants in respect of the said hereditaments and premises, or their estate and interest therein, or in any manner relating thereto, with interest, at the rate of 5*l.* per cent., on the sum of 288*l.* from the time the defendants entered upon and took possession of the said hereditaments and premises until the payment thereof; and that the sum of 288*l.* and interest should be paid by the defendants to the plaintiffs on the 20th day of August, A.D. 1849. That afterwards, to wit, on the 13th day of March, A.D. 1850, and before the commencement of this suit, the said D. Houghton, as such arbitrator, and according to and in compliance with the provisions of The Lands Clauses Consolidation Act, 1845, settled all the costs of the arbitration and incident thereto to amount to, and the same when so settled amounted to, the sum of

such tenants thereof from year to year; and that the compensation claimed by them, as in the declaration mentioned, was so claimed for and in respect of their said interest as such tenants from year to year of the said hereditaments, and not otherwise; and that the agreement between the plaintiffs and the defendants, that the said dispute should be settled by arbitration, was not an agreement made or entered into by them under or by virtue of the provisions of The Lands Clauses Consolidation Act, 1845, as to the settlement of disputed claims by arbitration in respect of lands taken or injuriously affected by the execution of any works, and for which satisfaction shall not have been made; and the nomination and appointment of the said Dugdale Houghton to be such single arbitrator was not a nomination and appointment made by the plaintiffs and defendants under or by virtue of the provisions of the last-mentioned Act; but the agreement and the nomination and appointment, respectively, were so made by the plaintiffs and the defendants by arrangement and agreement among themselves, irrespectively of the last-mentioned provisions of the last-mentioned Act, and in pursuance of a request to have the question of disputed compensation settled by arbitration, made by the plaintiffs to the defendants long before any taking possession by the defendants of the lands and hereditaments, to wit, on &c.

Special demurrer, assigning for causes (amongst others), that the plea neither traverses nor confesses and avoids the declaration; for even if the subject matter referred to arbitration by the agreement was not a matter which could be submitted, or which the parties could be obliged to submit, to arbitration under the compulsory provisions of The Lands Clauses Consolidation Act; yet it was competent for them, by agreement between themselves, to submit such subject matter to arbitration according to the provisions of that Act: also that the plea amounts to an

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argumentative traverse of the parties having made the agreement, and ought to have concluded to the country: also, that the plea attempts to refer to a jury matter of law, viz. the legal effect of the submission.—Joinder in demurrer.

Quain (*Bramwell* with him) argued in support of the demurrer (Nov. 17).—The declaration is good, and the plea bad. The defence attempted to be set up is, that as the plaintiffs are only tenants from year to year of the lands in question, their claim to compensation cannot form the subject matter of a reference under the arbitration clauses of The Lands Clauses Consolidation Act (a) (8 & 9 Vict.

(a) The following are the material sections referred to:—

Sect. 23. "If the compensation claimed or offered in any such case shall exceed 50*l.*, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice

their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided."

Sect. 25. "When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall

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submitted, however, first, that a yearly tenancy is strictly "an interest" within the meaning of the 68th section of the 8 & 9 Vict. c. 18; secondly, that even supposing it is not, still it was competent for the parties, by agreement, to submit this matter to arbitration in accordance with the provisions of that Act, and, they having done so, the award is valid. The agreement is binding under the 97th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), which enacts, that, "with respect to any contract which, if made between private persons, would by law be valid, although made by parol only and not reduced into writing, such committee, or the directors, may make such contract on behalf of the Company by parol only, without writing, and in the same manner may vary or discharge the same." The 68th section of the 8 & 9 Vict. c. 18, applies to cases where, as here, the promoters of the undertaking *have already* taken possession of the lands

receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him,

and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously

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submission, or other facts necessary to create a mutual obligation upon the parties to abide by the award: 2 Wms. Saund. 61, n. (1). But this submission is in writing only; and, the defendants being a corporation, it is *prima facie* void as against them: Watson on Awards, p. 72. Therefore, at common law, the declaration would be clearly bad. Is it, then, rendered valid by statute? The 97th section of The Companies Clauses Consolidation Act is confined to contracts made by the *committees* or *directors*. It is true that the 25th section of The Lands Clauses Consolidation Act authorises the secretary or clerk of the promoters of the undertaking to appoint an arbitrator; but that is only where the submission is under the compulsory clauses of that Act; in other cases there is no statutory provision enabling them to refer otherwise than at common law. The facts stated in this declaration do not bring the case within the 23rd section of The Lands Clauses Consolidation Act; for there is no allegation that the plaintiffs, by notice in writing, signified their desire to have their claim to compensation settled by arbitration; and unless they did so, that section requires the compensation to be settled by a jury. The power of appointing an arbitrator under the 25th section only applies to cases in which the requisites of the 23rd section have been complied with. For similar reasons, neither is this case within the 68th section. Even

is compulsory under the provisions of the statute. In *Gould v. The Staffordshire Potteries Waterworks Company* (a), the declaration averred the performance of every act necessary to constitute a binding submission under the arbitration clauses of the statute. Moreover, this is a case within the 121st section. The language of that section is general, and may well apply to all lands, whether the Company have taken possession of them or not. It is one of a class of sections commencing at the 119th, and headed, "With respect to lands subject to leases." There is nothing in those sections to indicate that the general language of the 121st section was intended to exclude cases in which the Company had already taken possession of lands.

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Bramwell in reply.—With respect to the objection that the submission was not authorised by the statute, it is expressly averred that the agreement was entered into in pursuance of the statute. If the fact were not so, that allegation should have been traversed. But the plea admits that such an agreement was entered into, and consequently every requisite form must have been complied with. The 25th section renders the agreement signed by the secretary binding on the Company. It is enough to bring the case within that section, that "a question of disputed compensation" has arisen. Where, indeed, either party refuses to concur in the appointment of an arbitrator, then the other must shew that all the necessary steps have been taken, in order to bring the case within the compulsory clauses of the statute; but if the parties choose to consent to an arbitration in accordance with the provisions of the statute, the only condition precedent is, that a question of disputed compensation should arise. The 25th section uses the words "*authorised* or required to be settled by arbitration." Every disputed claim to compensation, ex-

(a) 5 Exch. 214.

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ceeding 50*l.*, is authorised to be settled by arbitration, for it may be decided in that way if the parties think fit.

The argument having been adjourned until the next paper day (Nov. 19),

POLLOCK, C. B., then said.—We need not trouble Mr. *Bramwell* any further in this case, as we are all of opinion that the plaintiff is entitled to judgment, and on this very short and simple ground, viz. that there can be no necessity for a perfect compliance with all the statutory forms, where both parties concur in the appointment of an arbitrator. The notices required by the Act can only be necessary, where no option is exercised, and it is doubtful what the claimant may require; but where the parties agree to refer according to the statute, and that agreement is acted on, it is sufficient if the appointment of an arbitrator on the part of the Company is signed by the secretary.

PARKE, B.—This is a case where the parties agreed to refer; and in all cases of arbitration there is a power to refer by a submission signed by the secretary.

ALDERSON, B., and PLATT, B., concurred.



1851.

STURGES and Another, Assignees of GELL, an Insolvent, v.
Lord CURZON.

Nov. 3.

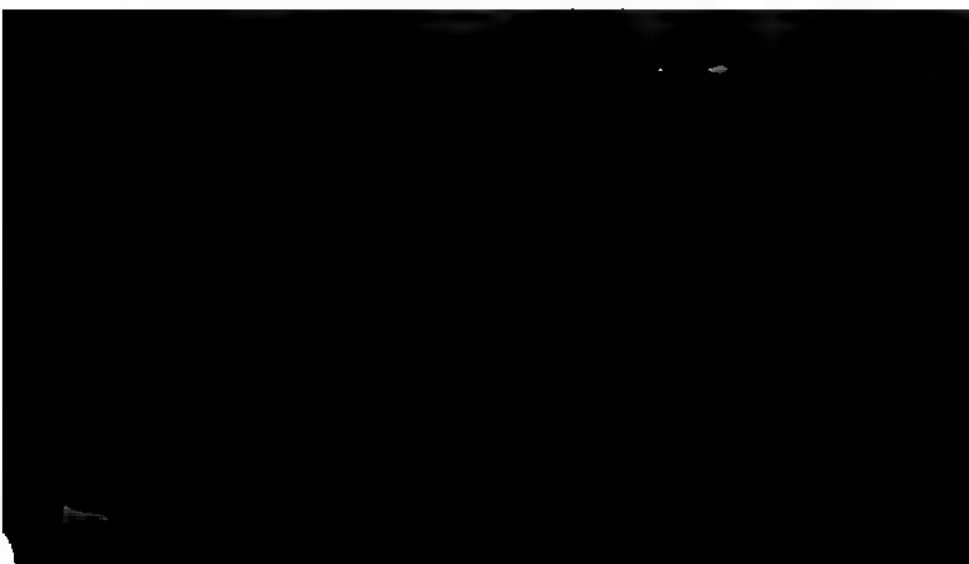
IN July last, an action was brought by one Gell, the now insolvent, against the present defendant, which came on for trial before *Pollock*, C. B., and a special jury, at the Sittings after Michaelmas Term, 1846, when a verdict was taken by consent for the plaintiff, subject to the award of an arbitrator, to whom all matters in difference in the cause were referred. The order of reference contained, amongst the other usual clauses, a stipulation that neither of the parties should prosecute or bring any action against each other in respect of the matters so referred. Several meetings were held before the arbitrator; but, before the defendant's case had terminated, the then plaintiff became embarrassed and left this country, and his attorney being unable to proceed for want of sufficient instructions, all further proceedings were suspended. In October, 1849, the then plaintiff took the benefit of the Insolvent Act, 1 & 2 Vict. c. 110, and the plaintiffs in the present action became his provisional assignees. In December, 1849, an order was made by *Alderson*, B., enlarging the time for the arbitrator to make his award, the period fixed by the submission having expired some months before; and the learned Judge also permitted the defendant to apply to the Court for security for costs. In Hilary Term, 1850, the Court made absolute a rule staying proceedings until the then plaintiff should give to the defendant security for costs. The rule was served, and no further proceedings were taken in that action. Before the present action was commenced, the attorney of the now plaintiffs had written a letter to the defendant, stating in effect that the present action was brought for the same causes as the former action by the insolvent. An application was, therefore, made to *Martin*, B., at Chambers, (after the submission and the en-

The Court will not stay proceedings in an action by the assignee of an insolvent debtor, on the ground that an action brought by the insolvent for the identical cause has been referred, by order of *Nisi Prius*, to an arbitrator, and the reference is still pending.

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largement of the time had been made a rule of Court, and had been served on all parties), to stay all proceedings until the fourth day of this Term, in order that application might be made to the Court to stay the proceedings absolutely. The learned Judge having made an order,

Keane now moved, on an affidavit stating the above facts, for a rule to shew cause why all further proceedings should not be stayed.—This action is brought to evade obedience to the order of the Court, by which further proceedings in the other action were made conditional on the plaintiff giving security for costs. The causes of action are admitted to be identical. The defendant has always been ready to fulfil the engagement which he entered into at the trial, and which he would not have entered into, if the Court had not been pledged to secure him the equivalent which he looked for, when he gave up his chance of a verdict. The plaintiffs cannot succeed to the rights of the insolvent, and, at the same time, divest themselves of the burthens which accompany them. The defendant therefore is entitled to be released from this second action for the same cause as the former, and to have the benefit of those proceedings in it which have already cost him so much. [*Parke, B.*—Bankruptcy is no revocation of a submission to arbitration. A person who agrees to refer a



parties to the former reference; not the former plaintiff, for he has not revoked the submission, and is not a party to this action. We cannot compel the assignees to become parties to the reference, then why should we stay proceedings in this action?] The Court will not keep faith with the defendant if they allow this action to proceed; for, when a reference was suggested, the defendant was induced to consent to it on the faith that the Court would enforce it. The submission is now a rule of Court. [*Alderson*, B.—The Court only undertook to enforce the submission under circumstances which would give it jurisdiction to interfere; the defendant took upon himself the risk of circumstances arising, under which the Court could not interfere for want of jurisdiction. Insolvency is a misfortune, against the consequences of which the defendant has no remedy. *Parke*, B.—I do not see what equity the defendant has: this is the necessary consequence of an insolvency. *Pollock*, C. B.—We will confer with my Brother *Martin*, and ascertain what were the grounds upon which he thought the proceedings ought to be stayed.]

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Cur. adv. vult.

On a subsequent day

PARKE, B., said.—We have consulted my Brother *Martin*, who states that he thought the defendant ought to be permitted to mention the matter to the Court; but that he never intended to express an opinion that the action ought to be stayed. There will therefore be no rule.

Rule refused.

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Nov. 5.

Sir HENRY WHEATLEY, Bart., v. BOYD.

The defendant being in possession of certain premises under a lease from two trustees for a term which had expired, a new lease was granted for a further term, but was executed by one of the trustees only. The defendant paid rent to both trustees until one of them died; and for the rent due after his death the other trustee brought an action for use and occupation: —*Held*, that he might maintain the action in his own right, and was not bound to sue as surviving trustee.

DEBT for use and occupation.—Plea, never indebted.

At the trial, before *Jervis*, C. J., at the last Surrey Summer Assizes, it appeared that Sir H. Wheatley, the present plaintiff, and John Williams, being trustees under the will of William Wheatley deceased, demised, by indenture, a certain farm and premises to one Logan, for a term which was assigned to the defendant, who entered, and remained in possession at the expiration of the term. A new indenture of lease was then prepared in pursuance of an agreement between the defendant and the two trustees. This indenture was executed by the present plaintiff and the defendant, but not by the other trustee; and it demised the farm in question to the defendant for the term of four years from Michaelmas, 1847. John Williams died on the 18th January, 1848. The defendant paid rent up to Michaelmas, 1849, to the agent of the trustees, who gave receipts, stating that the amount was "due to the trustees of the estate of W. Wheatley, for whose use the same is received." The present action was brought for one year's rent, due at Michaelmas, 1850. The declaration originally contained a special count on the indenture of demise; but that count was struck out by order of a Judge, the de-

is due to the plaintiff alone.] The contract was between the defendant and the two trustees. The rule is, that if a covenant be made with two persons, one of whom dies, the other cannot sue unless he describes himself as survivor. [Parke, B.—This is the case of use and occupation under a surviving trustee; therefore, the defendant is indebted to the survivor for the use and occupation by his permission whilst he was survivor. Your argument applies to the case of a covenant.] The declaration, in the first instance, contained a count on the indenture of demise, alleging that the plaintiff survived Williams; but that was struck out. [Parke, B.—Such a count could not be supported, because the defendant did not have all the consideration for his covenant which he bargained for, namely, the execution of the lease by both trustees.] In *Cooch v. Goodman* (a), the Court of Queen's Bench held that a lessee who executes an indenture of lease, is bound by all the covenants in it which run with the land, if he has entered and enjoyed for the whole term, although the lessor never signed or executed the lease. [Parke, B.—The authority of that decision may be questionable. All the law on this subject was considered in a late case in this Court: *Pitman v. Woodbury* (b). Pollock, C. B.—If the debt had accrued in the lifetime of the deceased trustee, then the plaintiff must have sued as survivor; but as the debt accrued after the death of the other trustee, the plaintiff may sue in his own right.] The 11 Geo. 2, c. 19, s. 14, enables a landlord to recover for use and occupation where the agreement is not by deed, so that if the terms of the Judge's order had not precluded the defendant from objecting that the demise was by an instrument under seal, the plaintiff could not have maintained this action. [Platt, B.—The effect of that arrangement is, to render the case the same as if there had been no demise under seal. Pollock, C. B.—If your argument be correct,

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(a) 2 Q. B. 580.

(b) 3 Exch. 4.

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the plaintiff ought to have declared that the defendant was indebted for use and occupation by the sufferance and permission of the plaintiff and the deceased trustee. The word "landlord" in the 11 Geo. 2, c. 19, s. 14, must mean the actual landlord, not a person deceased.] Between Michaelmas, 1847, and the 18th January, 1848, when the trustee died, the defendant was only bound to pay rent under the indenture and to both parties. There was an express contract; and in order to make the defendant liable in this action, there must be a new implied contract. [*Pollock, C. B.*—Where there is a lease under seal by two lessors and one of them dies, if the other proceeds on the indenture he must declare as survivor; but where he sues merely for use and occupation, he may declare in respect of an occupation by his sufferance and permission.]

POLLOCK, C. B.—We are all of opinion that there ought to be no rule, and for the reasons stated in the course of the argument.

Rule refused.

Nov. 4. DAVIES and Others, Executors, v. EDWARDS and Another.

One of three
 joint makers of
 a promissory

ASSUMPSIT by the plaintiffs, as executors of one H. Johnson, against the defendants, as makers of a promissory

inserted the note in his schedule, and the name of Johnson as a creditor for the note. In November, 1848, a dividend of 2*l.* 3*s.* 4*d.* was paid by order the Insolvent Debtors Court on account of the note.

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On the part of the defendants it was contended, that this payment was not sufficient to take the case out of the Statute of Limitations; and the Lord Chief Baron being of that opinion directed a nonsuit to be entered, reserving leave to the plaintiffs to move to set that nonsuit aside, and to enter a verdict for the amount claimed.

F. Edwards now moved accordingly.—The payment on account of the note by the insolvent was sufficient to take the case out of the Statute of Limitations. The schedule was made by the insolvent's authority, the debt was inserted in it, and the Insolvent Court made the payment to the creditor on the insolvent's account and at his request. In *Jackson v. Fairbank* (a), one of two joint makers of a promissory note having become bankrupt, the payee of the note proved under the commission and received dividends; and it was held that the receipt of the last dividend, being within six years of the commencement of the action, took the case out of the statute as against both makers. And in *Brandram v. Wharton* (b), the preceding case was admitted to be good law, although in the case before the Court it was held that a similar payment made in respect of the debt, for which a bill of exchange was given, did not take the case out of the statute with respect to the bill. [*Parke, B.*—To take the case out of the statute there must be a part payment of the debt, coupled with a promise to pay the remainder; the party who makes the payment must say in effect: "I make this payment on account of the debt."] A discharge under the Insolvent Debtors Act does not extinguish the insolvent's liability to the payment of his debts.

(a) 2 H. Bla. 340.

(b) 1 B. & Ald. 463.

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The payment therefore of the dividend involves a promise to pay the residue of the debt. [*Parke, B.*—I think you would have great difficulty in maintaining the proposition, that if an action were brought against the insolvent, and he were to plead the Statute of Limitations, you could take the case out of the statute by shewing the payment of a dividend by order of the Insolvent Court. The present question has been frequently before the Courts of late years.] The several cases upon the subject are to be found in 1 Smith's L. C., p. 319. It has no doubt been held, that part payment by the surviving maker of a joint and several promissory note does not take the case out of the statute as against the executor of his deceased co-maker: *Atkins v. Tredgold (a)*; but that decision rests upon the ground that the executor cannot be regarded as a co-contractor with the surviving maker of the note. [*Pollock, C. B.*—In this case, admitting the payment to have been made by the insolvent, it is a payment by a party who has ceased to be jointly liable with the other defendants. *Alderson, B.*—Under the Statute of Limitations, in order to make the payment binding on the other party the payer must be jointly liable with him.]

PARKE, B.—I am of opinion that there ought not to be a rule granted in this case, and that the learned Judge acted



tiffs; and the question is therefore wholly irrespective of the statute of the 9 Geo. 4, c. 14. This subject had not been so fully considered at the time the cases of *Jackson v. Fairbank* and *Brandram v. Wharton* were decided as it has been since; but of late it has undergone much consideration, and the principle has been several times laid down and acted upon in this Court, that a part payment in order to take a case out of the Statute must be made on account of a larger sum thereby admitted to be due, and must include a promise to pay the remainder. The first case which established that principle is that of *Tippets v. Heane* (a), where the question was, whether a sum of money paid to the plaintiff, but on what account did not appear, was sufficient to take the case out of the Statute of Limitations; I am there reported to have said, and no doubt correctly, "In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt; secondly, it must appear that the payment was made on account of the debt for which the action is brought. Here the evidence does not shew any particular account to which the payment was applicable. The jury seem to have considered it as a payment of part of the debt in question; and perhaps, as there was no other account found to have been in existence between the parties, they might be warranted in so doing. But the case must go further; for it is necessary, in the third place, to shew that the payment was made as part payment of a greater debt, because the principle upon which a part payment takes a case out of the Statute is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt." That decision took place in 1834. The same view was taken by Lord Abinger, C B., in 1840, in

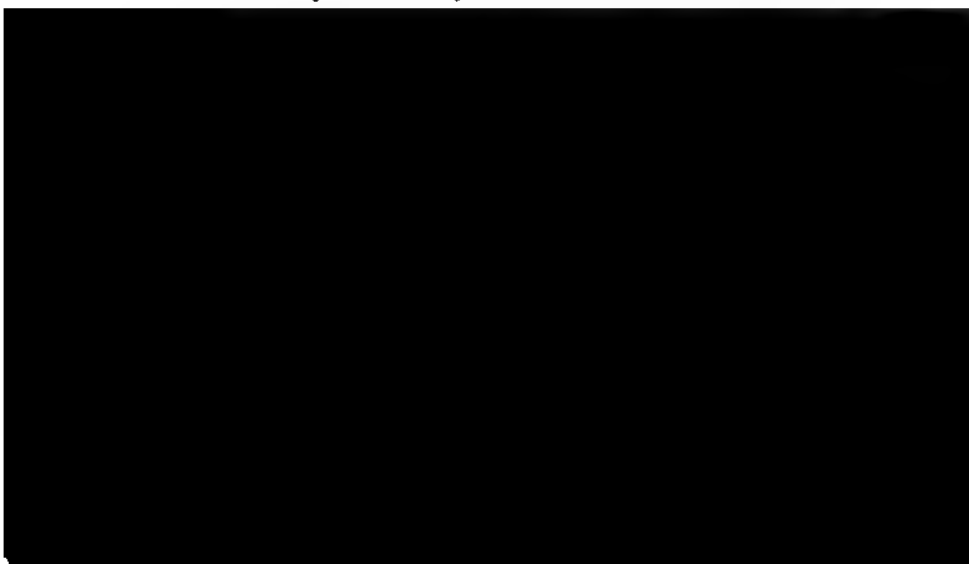
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(a) 1 Cr. M. & R. 252.

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his judgment in *Waugh v. Cope* (a). That was followed by *Wainman v. Kynman* (b), in 1847, where it was held that part payment of a debt is not sufficient to take a case out of the Statute, unless a promise can be implied therefrom to pay the remainder within six years of the commencement of the suit. Upon this principle, if the payment under such circumstances as the present by the party is not sufficient to take the case out of the Statute as against the party himself, for it is impossible to contend that a payment by the assignees of the bankrupt or insolvent involves a promise by him to pay the remainder to his creditor, a fortiori it cannot have that effect when not made by the party himself or his agent, but by a third person who is appointed to distribute his assets among his creditors. I am therefore clearly of opinion that the payment here is not sufficient to take the case out of the Statute, the payment having been made by a third party in such a manner as not to be binding either as against the insolvent or as against his co-contractors.

ALDERSON, B.—I am of the same opinion. This payment is not an admission that the debt is due, coupled with a promise to pay the remainder; but it is merely a payment made by a permission granted to the assignee, and confirmed by the Court, to distribute the insolvent's assets



1851.

Nov. 8.

BAMFIELD and Others, Executors, v. TUPPER.

ASSUMPSIT by the plaintiffs as executors of J. Karslake, upon the following promissory note:—

“ We jointly and severally promise to pay on demand to Mr. James Karslake the sum of 80*l*.

“ 1843.

“ JOHN TUPPER,
THOMAS TURNER.”

The defendant pleaded the Statute of Limitations.

At the trial, before Lord *Campbell*, C. J., at the last Bristol Assizes, in order to take the case out of the Statute of Limitations, it was proved that payment of interest had been made on account of the note by the defendant within six years of the commencement of the action. On the part of the defendant it was contended, that this alone was not sufficient, as it was not part payment of the debt. The Lord Chief Justice however directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to set that verdict aside, and to enter a verdict for him.

Payment of interest upon a promissory note payable on demand, is sufficient to take the case out of the Statute of Limitations, although there be no independent evidence that any demand of payment of the note has been made.

Montague Smith now moved accordingly.—Interest was not payable on the face of the note. The note being payable on demand, after demand made interest would have been due upon it; but there was no evidence that any demand had ever been made. The payments made by the defendant were not in reduction of the principal sum, or payments as interest really due upon the note. The 9 Geo. 4, c. 14, enacts, that nothing in this Act “ shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever.” But in this case, where the payment of interest is sought to be made use of in order to take the case out of the Statute, interest must in fact be due upon the debt. [*Parke*, B.—The payment of interest is an acknowledgment that

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the debt is due, and is an act from which a promise may be implied to pay the debt itself. The statute 9 Geo. 4, c. 14, leaves the matter as to payment as it stood before that Act. *Platt, B.*—The payment is clearly an admission that the debt was then due upon which the payment of the interest was made.]

PER CURIAM (a).—There will be no rule.

Rule refused.

(a) *Parks, B., Alderson, B., and Platt, B.*

Nov. 22.

LAWRANCE v. BOSTON and Others.

A., being indebted to the defendant in the sum of 184*l.* 7*s.* 6*d.*, by indenture assigned to him certain furniture, and also a policy of assurance, with a proviso for redemption on payment of the price of the money

TRESPASS for breaking and entering the plaintiff's house and taking his goods.

Pleas.—First, not guilty. Secondly, that the house was not the plaintiff's; and thirdly, that the goods were not the plaintiff's goods.—Issues thereon.

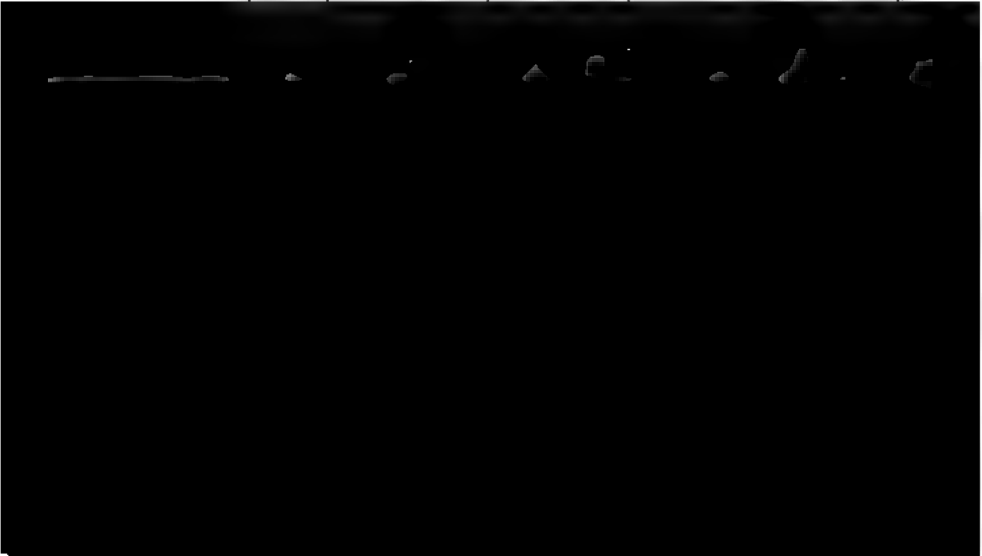
At the trial, before *Cresswell, J.*, at the last Suffolk Assizes, the defendants, in answer to the plaintiff's claim to the goods, offered in evidence an indenture, of the 8th of December, 1849, made between Henry Guy of the one part,

of 449*l.* 19*s.* 6*d.*, subject to the payment of the annual premium of 9*l.* 8*s.* 4*d.*; and also reciting that Guy was indebted to Boston in 184*l.* 7*s.* 6*d.*, for money advanced by the latter to Guy; and that it had been agreed by the said indenture, that the said sum of 184*l.* 7*s.* 6*d.*, with interest thereon at the rate therein mentioned, should be secured to Boston: it was witnessed that, in consideration of the covenant thereafter contained on the part of Boston, for securing to him the payment of the said sum of 184*l.* 7*s.* 6*d.*, and interest thereon, Guy bargained, sold, and assigned unto Boston and his executors, &c., all Guy's household goods, furniture, &c., which then were or might be in the dwelling-house in the occupation of Guy, during the continuance of the said security, and also the policy of assurance, and also the said sum of 449*l.* 19*s.* 6*d.* thereby assured, and every other sum which should be added to the sum insured, or which might become due in respect thereof, subject to a proviso for redemption on repayment of the sum of 184*l.* 7*s.* 6*d.*, payable by instalments, with interest at the rate of 5*l.* per cent. per annum, at certain specified times; and with a further proviso that, in case of default in payment of any one of the instalments of the said sum of 184*l.* 7*s.* 6*d.*, and interest, or any part thereof, Boston, his executors, &c., might enter the dwelling-house of Guy, where the said goods and chattels should be, and take possession of and hold the same, and sell and dispose of them and of the policy of assurance, and reimburse himself out of the monies realised all costs and expenses occasioned by such proceedings and the recovery of the said sum of 184*l.* 7*s.* 6*d.* and interest respectively, and all such sums as might be spent in keeping on foot the said policy, and pay himself the whole of the said sum of 184*l.* 7*s.* 6*d.* and interest, or so much thereof respectively as should then be due, and then account for the surplus, if any, unto Guy, his executors, &c. Then followed a covenant by Guy to pay Boston the said sum of 184*l.* 7*s.* 6*d.* with interest, by instalments, in the manner before mentioned, and also to

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pay the insurance office the annual premium of 9*l.* 8*s.* 4*d.*; and in case the policy should be avoided by any of the causes expressed therein, or if that office should become insolvent, that Guy would thereupon insure for a like sum in some other office, and assign the policy to Boston, with like powers, &c.; but that if Guy should neglect at any time to pay such annual premium or to insure, Boston should have the like power to pay the premium or to effect an assurance upon the best terms he could; and that whatsoever sum or sums of money should from time to time be so advanced by Boston, his executors, &c., for the continuance of or making a fresh policy, should be considered as *principal monies*, and bear the like interest; and that the said recited or any future policy should be a security to Boston for the repayment thereof, and that they should not be redeemed without repayment of the sums advanced and interest, as well as the 184*l.* 7*s.* 6*d.*: it was finally covenanted by Boston that, until default in payment of any of the instalments of the principal sum of 184*l.* 7*s.* 6*d.*, Guy was to have possession of and to enjoy the use of the said goods, chattels, and the said policy.—The instalments not having been paid, the defendants seized the property in question, and the plaintiff thereupon brought the present action. The above deed bore a 2*l.* stamp; it was thereupon objected on the part of the plaintiff that the stamp



Prendergast, in the present Term, obtained a rule nisi for a new trial, on the ground that this document was improperly received; and cited *Halse v. Peters* (a) and *Wroughton v. Turtle* (b).

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Byles, Serjt., and *Couch*, for the defendant Boston; *O'Malley* and *Keane* for another defendant; and *Power* for two other defendants, shewed cause (Nov. 20 and 21).—The stamp imposed upon this deed is sufficient. The plaintiff will contend that the amount of the money secured by the instrument is uncertain, and therefore that the stamp ought to have been one of 25*l.*, as required by the Stamp Act, 55 Geo. 3, c. 184, Sched., Part I., "Mortgage." The case of *Halse v. Peters* (a), which may give a colour to that argument, is overruled by *Doe d. Mercer v. Bragg* (c), *Doe d. Scruton v. Snaith* (d), and *Wroughton v. Turtle* (b). The effect of this deed is to secure to the mortgagee the repayment of the sum of 184*l.* 7*s.* 6*d.*; and although certain other matters are provided for, they are merely inserted with a view to secure and give to the mortgagee the power of recovering the amount mentioned, but no further amount. It is a mortgage of goods, of a policy of insurance, and of any future policy which in the events mentioned in the deed might become substituted for the original policy. But none of such amounts could be recovered as a *debt* at law. The case therefore falls within the principle laid down by this Court in *Wroughton v. Turtle*, where *Parke*, B., says—"In the Schedule to the 55 Geo. 3, there are two classes of mortgages. . . . These two classes appear to embrace mortgages for all descriptions of *debts*: the first

ment in any deed, whereby any annuity shall be granted or secured for such life or lives:—If the total amount of the money secured, or to be ultimately recoverable thereupon, shall be un-

certain and without any limit, 25*l.*"

(a) 2 B. & Ad. 807.

(b) 11 M. & W. 561.

(c) 8 A. & E. 620.

(d) 8 Bing. 146.

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present; the second future. The first class in express terms embraces present loans and *debts* only; the second ought to be construed in the same way, to apply to future loans and debts only; for there is no reason why a mortgage for the same description of payment should be subject to duty in one case and not in another; why it should be subject to duty if made after the execution of the instrument, and not if made before. By holding that the word 'paid' means so paid as to constitute a debt and the re-payment of which the mortgage is to secure, the whole enactment is rendered reasonable and consistent." The clause in this deed, which provides for the payment of the expenses incurred in effecting a new policy is not requisite, inasmuch as such expenses would be allowed by a Court of equity without any stipulation whatever: *Doe d. Scruton v. Snaith* (a); and therefore this part of the case falls within the principle, "expressio eorum quæ tacitè insunt nihil operatur." The same rule is applicable to the stipulation, that the monies advanced for continuing the policies shall bear interest. These payments are to be made purely with a view to guard the principal sum secured, and are merely subsidiary to it. Interest would be allowed by a Court of equity on all the expenses; so that the deed contains no power which the law would not confer without it. If the interest would not be allowed, *Doe d. Scruton v. Snaith* (a) was wrongly de-

property mortgaged, but are subsidiary and merely paid for the purpose of preserving the security. Besides, the covenant is, that the sums advanced shall be considered "as principal monies," not *the* principal money. The mortgagee could maintain no action on the deed for these advances.

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Prendergast and *Cowling*, in support of the rule.—In *Wroughton v. Turtle* (a), the lease, which was for lives, contained a covenant for renewal on payment of a sum certain. That amount was therefore a necessary charge annexed to the estate at the time of the mortgage. Here the amount which the mortgagee might have to advance is wholly uncertain. Circumstances might arise, as for instance the insolvency of the present insurance office, which would render it necessary to effect a new policy with another office, and at a totally different rate of premium. The sums so advanced would be a charge upon the furniture; for the deed expressly stipulates that such advances shall be considered as principal monies and bear interest. They constitute a debt, in respect of which an action of covenant might be maintained. The cases relied on by the other side are distinguishable; for there the additional sums were expenses to which the mortgagee would have been entitled, though the deed contained no express stipulation for their payment; so that the maxim, "expressio illorum quæ tacitè insunt nihil operatur," applied. But an outlay for premiums of assurance is not, like costs, incidental to a mortgage, there being no implied stipulation or duty on the part of the mortgagor to renew the policy; and if the mortgagee chooses to do so, that does not create any debt between the parties: *Lacam v. Martins* (b). The agreement is, that the mortgagee may advance money under circumstances which would not, without an express stipulation to that effect, create any debt.

(a) 11 M. & W. 561.

(b) 1 Wils. 34.

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If the present case be not within the statute, this consequence will follow, that, where a leasehold estate is mortgaged for a small sum, and the mortgagee is at liberty to renew the lease on payment of a fine, which might amount to several thousands, that advance would be a charge upon the estate, but no stamp duty would be payable in respect of it. The exception in the statute as to certain insurances shews that the legislature had in view an outlay of this description, and considered it liable to duty. It is immaterial whether these advances would form a charge in equity; for, upon forfeiture, the estate becomes at law the absolute property of the mortgagee, and a Court of equity will not relieve the mortgagor except on payment of all expenses. *Halse v. Peters* (a), which is recognised in *Wroughton v. Turtle* (b), governs this case. In *Doe d. Scruton v. Snaithe* (c), the sums advanced were only such expenses as in an ordinary mortgage deed there would be an implied covenant to repay. *Frith v. Rotherham* (d) proceeded on the ground that commission, due on an over-drawn banking account, was not money lent, but was extraneous to the loan.

Cur. adv. vult.

The judgment of the Court was now delivered by



The case of *Wroughton v. Turtle* seems to us to decide the present question, when properly considered. There it was laid down by this Court, that a security, by which advances thereafter to be made are constituted, when made, a debt recoverable at law between the parties, requires, in case those debts are not limited in amount, a stamp of 25*l.*; but where those advances are only charges on the property mortgaged, but not debts recoverable at law, the amount of the stamp is limited by the amount of the original debt secured. There is also a second principle adverted to in the judgment, namely, that if the charges expressly laid on the property by the deed are such as, without express words, would fall on the property mortgaged, the same consequence follows, that they are not to be added, in considering the amount of the stamp requisite, to the original debt secured.

Now, we think, that the first of these principles is sufficient to decide the present case. The sum secured here is 184*l.* 7*s.* 6*d.* It is secured by a mortgage deed on furniture, and on a policy of insurance for 499*l.* 19*s.* 6*d.* in the Mitre Insurance Office. There is a stipulation that, if the mortgagor does not duly pay the premiums, the mortgagee may do so, and add them as a charge on the whole property mortgaged. If this charge had been confined to the policy, the principle, "*expressio eorum quæ tacitè insunt nihil operatur*," would have applied; but it is not so confined as to this policy. But though this is so, we do not think that, on the proper construction of the whole deed, these charges, when paid by the mortgagee, become *debts* due from the mortgagor to him, and recoverable at law. The covenant to pay is confined to the original debt of 184*l.* 7*s.* 6*d.* As to the expenses of obtaining a fresh policy, and the payment of those premiums by the mortgagee, we think the deed properly construed charges them only on the new policy, and does no more than, without such an express

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chargé, a Court of equity would have compelled the mortgagor to do. And the words, that those charges shall be "principal monies" and bear interest, followed by the clause expressing that such principal monies and interest shall be charges on this second policy, and shall be deducted out of its eventual proceeds, do not, as we think, amount to any covenant by the mortgagor to pay them to the mortgagee. To this part of the deed therefore both the principles stated in *Wroughton v. Turtle* apply. Looking at both parts of this mortgage-deed, we think that the only recoverable debt secured by it was that of 184*l.* 7*s.* 6*d.*; and therefore that the stamp was sufficient. The rule must be discharged.

Rule discharged.

Nov. 15. ROE v. THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE
 JUNCTION RAILWAY COMPANY.

The plaintiff,
 being desirous
 of going by an
 excursion train
 from Monks
 Ferry, the de

TRESPASS for assault and false imprisonment.—Plea,
 not guilty, and issue thereon.

At the trial, before *Maule, J.*, at the last Chester Spring



Assizes, the plaintiff's case was as follows:—The plaintiff and a friend having read an advertisement in the newspapers, in June, 1851, that an excursion train would, on a day mentioned therein, leave Monks Ferry, near Liverpool, for Bangor, inquired of the clerk at the Monks Ferry station (which was one of the stations upon the defendants' line) by what train they could return in the evening. The clerk told them, that he believed they could return by the train which left Bangor at half past seven. The plaintiff and his friend having obtained two tickets, for which they paid 6s. 6d. each, proceeded by the excursion train to Bangor. They returned from Bangor by the half past seven o'clock train; but, on arriving at the platform where the tickets were taken, within a short distance from the Chester station, they were told by a person in railway livery, who came to take the tickets, that they had come by the wrong train, and that they must pay 2s. 6d. each in addition to what they had already paid. To this they objected, and thereupon they were desired to go to "the superintendent" at the station. They did so, and there a person, who was stated to be a superintendent (for what Company did not expressly appear) on hearing the circumstances, again demanded payment of the 2s. 6d.; and, on the plaintiff and his friend still refusing to pay it, the superintendent directed a railway servant named Phillips to take them into custody. This he accordingly did; but the plaintiff and his friend were shortly afterwards liberated upon payment under protest of the additional sum claimed. One of the witnesses stated, that he believed Phillips to be one of the servants of the defendants' Company. It appeared that the Chester station was occupied not only by the defendants' Company, but by three other Companies also. The plaintiff made several applications through his attorney, by letter to the secretary of the defendants' Company, for compensation for the detention and the expenses which had been thereby occa-

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sioned. To one of these letters the plaintiff received the following answer from the secretary of the Company:—

“ Sir,—I am in receipt of your letter of the 3rd instant, and will thank you to give me the date on which the demand was made on Mr. Roe and his friend at Chester, when I will make the necessary inquiry.”

The defendants' counsel objected to the reception of these letters, on the ground that they were not evidence against the Company, without evidence of authority from the Company to the secretary to write them. The learned Judge, however, received them.—The secretary afterwards called upon the plaintiff, and offered to repay him the 5*s.*, observing that it was an awkward business, and that the blame would fall upon the station clerk at Monks Ferry, for giving the plaintiff the false information. The station clerk also apologised to the plaintiff for the annoyance which he had suffered by the blunder, and offered him 5*l.* to settle the matter, which the plaintiff refused.

Upon this state of facts, it was objected on the part of the defendants, that the plaintiff must be nonsuited, as there was no evidence that the defendants had authorised or sanctioned the plaintiff's arrest. The learned Judge declined to nonsuit, and left the case to the jury, who found a verdict for the plaintiff, with 50*l.* damages; leave being

had the use of the necessary stations, and had in their employment servants duly authorised to take the tickets of the passengers, and to act in pursuance of the rules and regulations of the Company for the purpose of enforcing them. The station at Chester, although shewn to be occupied by several Companies, must for this purpose be assumed to have been in the occupation of the defendants. Phillips and his fellow servant appeared in railway uniform, and received the tickets in the usual course of business; there was therefore some evidence that they were the defendants' servants, and were acting under their authority. The money paid by the plaintiff under protest came into the hands of the Company, for the secretary's offer to restore it to the plaintiff is evidence of that fact. The statement of the secretary that the station clerk at Monks Ferry would be injured by the false information he had given, is also evidence that the Company had acted in the matter.—For these reasons, and on the ground of public policy, they contended that there was some evidence that the defendants had authorised the act or had sanctioned it. In the course of the argument they cited *Glynn v. Houston* (a), *Blakemore v. Glamorganshire Canal Company* (b), *Smith v. Birmingham and Staffordshire Gas Light Company* (c), and *Buron v. Denman* (d).

Welsby and *T. Jones* in support of the rule, were not called upon.

POLLOCK, C. B.—I am of opinion that the rule ought to be absolute to enter a nonsuit. Assuming that the evidence objected to was properly received, namely, the letters of application on the part of the plaintiff to the secretary of the Company, and the letter in answer thereto (e), it does

(a) 2 M. & G. 337.

(b) 2 Cr. M. & R. 133.

(c) 1 A. & E. 526.

(d) 2 Exch. 167.

(e) See *Burnside v. Dayrell*, 3 Exch. 224; and *Rennie v. Wynn*, 4 Exch. 691.

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not follow that we are at liberty to draw the inference that the arrest was authorised by the Company, but merely that the letter was written by the secretary of the Company on their behalf, in answer to the plaintiff's application. But it appears to me, that neither do the facts of the case, without reference to the letters, nor when taken in conjunction with them, afford any evidence whatever to justify us in saying, that the defendants authorised or sanctioned, or that they are in any way liable for, the act of which the plaintiff in the present action complains. I must certainly say I regret that such is the result of our decision, inasmuch as the damages awarded are by no means excessive. But we must administer the law, not merely as between the public and a Railway Company, but upon the broad principles which govern the relation between principal and agent, and master and servant. And we ought to endeavour to lay down a rule which will apply equally to either case, when the same question shall arise upon some future occasion. The rule is the same between a private individual and a Railway Company, as it is where the same matter is in dispute between two private individuals. The general rule is, that a master is not liable for the tortious act of his servant, unless that act be done either by an authority, express or implied, given him for that purpose by the master. If it had ap-

although there may have been some evidence that Phillips was in the service of the Company, there was no evidence whatever that he had any previous authority from the Company to take the plaintiff into custody. And I think the correspondence with the secretary does not carry the case any further; so that there is also an absence of all evidence of their having ratified the act. Taking, therefore, into consideration all the facts of the case, it appears to me that there is no evidence whatever upon which to found the liability of the Company. And I am of opinion that, according to the leave reserved by the learned Judge at the trial, a nonsuit ought to be entered.

PARKER, B.—I am clearly of the same opinion. The arrest not having been effected by the defendants themselves but by a third party, in order to render the defendants liable, the plaintiff was bound to shew that the act of which he complained was by an authority, express or implied, given by the defendants, or that it had been subsequently ratified by them. At first I entertained some doubt whether there was any evidence whatever that Phillips was a servant of the Company; perhaps, however, we may assume from what was said by one of the witnesses, that there was some evidence upon that head; but still there was no proof that he had ever received any general authority from the Company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to shew that, as a servant of the Company, he was authorised to make any arrest on their behalf, much less that he had any direct authority to take the plaintiff into custody. The case is therefore resolved into the question, whether there was any ratification of the act by the Company; and I am clearly of opinion, that there was no evidence whatever of such ratification. The letter of the secretary (admitting for a moment that it was properly received in evidence), and the whole of the correspon-

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dence taken together, merely has reference to a compromise, but does not lead to the inference that the act done by the servant of the Company is to be taken as binding upon them; so that no subsequent ratification can be implied from the terms of the correspondence between these parties. If we consider all the proceedings subsequent to the arrest, they merely go to shew that the matter arose entirely from a mistake of the clerk at the station, who upon taking the plaintiff's money incorrectly informed him that he might return by the evening train. The conversation does not shew that the arrest was authorised by the Company. I agree with what has been said by my Lord Chief Baron, that the same rule must be applied to Railway Companies as to individuals, and that we ought not to stretch the law against these bodies, merely because they perhaps may be considered better able than private individuals to pay for injuries done by their servants.

ALDERSON, B.—I am of opinion that the rule ought to be absolute to enter a nonsuit. I must own that I entertain great doubts whether there is any evidence that the officer who arrested the plaintiff was a servant of the defendants, as it appears that the station at Chester is not in the occupation of the defendants alone, but that several other Companies occupy it; and if this evidence is suffi-

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CROSS v. CHESHIRE.

Nov. 4.

ASSUMPSIT for money paid, and on an account stated.
—Plea, non assumpsit; and issue thereon.

At the trial, before *Williams, J.*, at the last Liverpool Assizes, it appeared that the plaintiff and defendant had been in partnership together for several years previously to and at the time the note hereinafter mentioned was given; and that they had a banking account with a Mr. Firth, a banker, who was also the defendant's private banker. In December, 1846, an application was made to the defendant by the bank for the sum of 268*l.* 2*s.* 3*d.*, as the balance of the account of the bank against the firm. On the 19th of that month the defendant wrote to the bank in reply, that the balance arose from a debt of his (the defendant's) own, and had nothing to do with the partnership account. In October, 1847, the defendant gave Mr. Firth a promissory note signed "Cross & Cheshire," for the sum of 268*l.* 2*s.* 3*d.*, being the amount of the balance still due. This note having afterwards been dishonoured, and the defendant having become bankrupt, Mr. Firth sued the plaintiff; and the plaintiff, having been compelled to pay the amount of the note, now sought to recover it in the present action from the defendant. It was objected, on the part of the defendant, that under the circumstances the action for money paid would not lie. The learned Judge however overruled the objection, and the plaintiff had a verdict for the amount claimed.

T. Jones now moved for a rule nisi for a new trial on the ground of misdirection, and also on affidavits on the ground of surprise.—The plaintiff and defendant were in partnership together at the time the note was given. The note is signed in the partnership name, and the

A. and B., in partnership together, had an account at a bank where B. also kept a private account. The bank having a balance against the firm, applied to B. for payment, when B. returned for answer, that the debt was his own, and had nothing to do with the partnership accounts. B. afterwards gave the bank a promissory note, signed in the partnership name, for the amount of the balance. The bank afterwards sued A. upon the note, and recovered the amount of it from him:—*Held*, that A. might maintain an action against B. for money paid to B.'s use, as B. had admitted that the debt for which the note was given was his own, and was not connected with the partnership accounts.

Semble, that an affidavit sworn before the Deemster in the Isle of Man cannot be used, unless it be

shewn that he has power to administer an oath.

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plaintiff rests his claim solely through the note, and therefore the action for money paid to the defendant's use will not lie. The plaintiff's remedy is either by a bill in equity for an account and dissolution of the partnership, or perhaps by a special action on the case for an improper use of the name of the firm. [*Pollock*, C. B.—We must take it as a fact, that the jury were at liberty to find, and that they have found, that the note was given by the defendant for his own private debt. The ground of this form of action is, that the plaintiff has been compelled to pay the defendant's debt, and the machinery by which he has been compelled to make that payment is altogether immaterial.] The observations of Lord *Eldon* in *Ex parte Young* (a), seem to be expressly in point. There, A, B, and C, being in partnership, C. fraudulently borrowed money and drew bills in the partnership name for his private use. C. afterwards absconded, and a commission of bankruptcy was issued against him, under which he was declared a bankrupt. After the bankruptcy A. and B. paid all the joint debts, including those so fraudulently contracted by C. Lord *Eldon* held that they were entitled to prove the latter debts under the commission against C., in competition with his separate creditors. "It has been objected," observed his Lordship, "that the proof cannot be admitted, because thereby the solvent partners are admitted to prove


considered as his separate creditors? In bankruptcy the administration of the estate is both legal and equitable. Prior to the bankruptcy the solvent partners might have filed their bill to compel the bankrupt to pay that money which he had so misapplied; and how is that equity shaken by the bankruptcy? Although the two solvent partners, impeded by the technical form of legal proceedings, could not have maintained an action against the bankrupt, yet undoubtedly, upon equitable principles, the bankrupt was a trustee for and accountable to them; and a Court of equity would have taken care to modify its equitable remedy, unshackled by the formal impediments of law. The bankruptcy embracing equitable as well as legal principles, leaves that remedy unaffected." Lord *Eldon* there says, that the claimant has no legal remedy. [*Alderson*, B.—In the present case it would be unnecessary to enter into the partnership account, for the defendant admits that this particular sum is altogether separate and distinct from those accounts, when he says it is his own private debt.] —In moving on the ground of surprise, he proposed to read an affidavit, purporting to be sworn in the Isle of Man before the Deemster; and that affidavit was accompanied by another affidavit, in which it was deposed that the person before whom it was sworn was Deemster. [*Parke*, B.—I very much doubt whether we can take judicial notice of the fact that the Deemster in the Isle of Man is a person who has the power to administer an oath; but you may read it de bene esse.]

POLLOCK, C. B.—I am of opinion that there ought to be no rule in this case. With respect to the alleged misdirection, it appears to me that the learned Judge correctly laid down the law to the jury. I apprehend it to be perfectly clear that, as a general rule, where one of two persons has been compelled to pay the debt of the other, his remedy to recover back the money so paid is by an action

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for money paid to the defendant's use; and that the means by which that mischievous effect has been produced cannot deprive the party of his remedy. If one partner has cheated his fellow partner, through the intervention of a note given in the name of the firm—unless perhaps where the party is deprived of his remedy by the act being a felonious one—that other party is entitled to recover against him, as for money paid to his use, the sum paid in satisfaction of an apparent debt of his own, created by a fraud on the partnership. Mr. *Jones* admitted that the note, though made in the partnership name, was in truth given by the defendant for his own private debt; and we must take it that the jury have found that to be the fact upon the evidence submitted to them. Under these circumstances, it appears to me to be very clear that money paid will lie. I think that the case of *Ex parte Young*, which has been so much insisted upon, has really nothing to do with this question; there Lord *Eldon* merely decided that two partners out of three might prove against the estate of the third in respect of monies fraudulently taken from the firm. But that case does not in the least impeach the ruling of the learned Judge here, that if one of two partners is called upon by the act of the other to pay his private debt, he may recover the money so paid in this form of action. There is, therefore, no ground for imputing misdirection. And upon the affida-



for the letter referred to takes the balance out of the partnership account altogether, being in effect an admission by the defendant that the sum advanced by the bank was his own private debt, and not that of the partnership. After that letter, the effect of which is that I have stated, the case is simply this, that the defendant has made a false use of the partnership name to obtain payment of his own private debt; on that ground the plaintiff is entitled to maintain this action against the defendant to recover from him the amount he has paid. I agree with my Lord Chief Baron that the case of *Ex parte Young* has no bearing on the present question. No account was there stated with the bankrupt whereby he confessed himself bound to pay the amount; but the petitioners proceeded upon the ground that the bankrupt had abstracted too much money by fraudulently augmenting the partnership debts which the petitioner would ultimately have to pay. Lord *Eldon* there said, that on a commission of bankruptcy, which has a jurisdiction both at law and in equity, if it appears that some of the partners of a firm have, in consequence of the misconduct of their copartner, paid what they ought not to have been called on to pay, and for which payment they would have their remedy against him by a bill in equity, that payment may be considered as a debt between him and them, and consequently that they are entitled to prove it against his estate. But I rest the present case entirely on the ground that the defendant, by the letter of the 19th of December, 1846, has admitted that this balance was a matter which was not included in the partnership accounts at all. The defendant having improperly used the partnership name of Cross & Cheshire in making the note which he gave for his own private debt; and the plaintiff having been compelled to pay that note, he is entitled to recover the amount so paid from the defendant in the present action; the note was merely part of the machinery by which the plaintiff was compelled to make the

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payment. With respect to the application on the ground of surprise, I think that we ought in strictness to reject the affidavit which is sworn in the Isle of Man, as not being in compliance with the practice. The Master has directed my attention to the rule on the subject, which is, that in case of foreign affidavits the authority of the person to administer the oath, before whom the oath is professedly taken, must be shewn; with respect to the Irish and Scotch judges, the rule is different, for we know that they have power to administer the oath. I entertained some doubts at first whether there ought not to be a rule on the ground of surprise; but as I think the affidavit in question ought not to be used, those doubts no longer exist.

ALDERSON, B., and PLATT, B., concurred.

Rule refused.

Nov. 8. GOUGH v. FINDON and Another, Executors of J. CLARKE.

Among the papers of a testator were found two letters, sealed and directed to the

ASSUMPSIT—against the defendants as executors of J. Clarke. The declaration contained counts upon two promissory notes for 400*l.* and 200*l.* respectively, made by the testator in favour of the plaintiff. There was also a count

prior to the time of his death, but had left him, having had a child by him. Shortly after the testator's death, the executors found two letters directed to "Sarah Gough, my late servant." Each of the letters, which were sealed, contained a promissory note signed by the testator, but not attested, one for 400*l.* and the other for 200*l.* One of these letters stated, "In addition to anything I may owe you, I inclose you 200*l.* as a mark of my respect." The other letter, inclosing the note for 400*l.*, stated it to be "for your long and faithful services." The plaintiff applied to the executors for payment of these notes, and at that time handed them and the letters to the executors. They paid her 200*l.* on account, and promised to pay the remainder; which they subsequently refused to do, and the plaintiff thereupon brought the present action.

Upon this state of facts, the learned Judge was of opinion that the plaintiff could not maintain the action: first, because the notes were invalid, as being in the nature of a legacy, and not being made in the presence of two credible witnesses as required by 1 Vict. c. 26 (The Wills Act); and secondly, that as the executors were not liable upon the notes, their promise was not founded upon a good consideration, and therefore the count on the account stated could not be supported. His Lordship thereupon directed a nonsuit, reserving leave to the plaintiff to move for a rule to set that nonsuit aside, and to enter a verdict for 434*l.*

Humfrey now moved accordingly.—One of the questions here is, whether a note made by a testator in favour of a particular person, and delivered by the executor to the payee, will support an action on the note against the executor. [*Parke, B.*—The two notes in truth amount to an informal legacy. The testator carefully inclosed them in sealed envelopes, and directed them to the plaintiff. It was clearly his intention that the notes should not be de-

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livered to her until after his death. The executors make a part payment, and promise to pay the remainder, upon the supposition that the notes are due, and that they are bound to pay them; but this turns out not to be the case, and the promise, not being founded upon a good consideration, is not binding upon them. Now to make an account stated, the account must be stated with reference to a debt which is at that time due and owing. Here there was evidence in the first instance that there was an account stated; but that evidence, when explained, amounts to a mere promise to pay a supposed debt which has no existence. Upon these grounds I directed a nonsuit.] The letters of the testator, inclosing the promissory notes, afford some evidence of a consideration upon which to support the count on the account stated. It appeared that the plaintiff had been in the service of the testator for some years. The letters alluding to that service contain the expression that it is "in consideration of her long and faithful services." The letters would be evidence of an account stated as against the testator. Suppose it had appeared that a note had been left by the testator for the purpose of satisfying a debt due for goods sold and delivered to him, and the note on production at the trial was not admissible for want of a proper stamp, a promise by the executors to pay the amount would support an account stated. [*Parke, B.*—Where a person serves

to her until after his death. They, therefore, were intended to operate as a legacy. But by the recent Wills Act, those instruments are not valid as a legacy. Now the executors' promise was founded entirely upon the supposition that the notes were valid instruments; but as they are not, the promise so made has no effect, and cannot be sued upon.

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ALDERSON, B.—An account stated, to be good, must be founded on a debt then due and owing. Here there is no debt, and consequently no account stated.

MARTIN, B., and PARKE, B., concurred.

Rule refused.

REES v. WILLIAMS.

Nov. 6.

IN this case a plaint had been entered in the County Court of Merionethshire, at Dolgelley, in which plaint the plaintiff claimed "50*l*. for money had and received by the defendant for the use of the plaintiff for the lease of a mine, and on an account stated." The plaint was afterwards removed by certiorari, by an application on the part of the defendant; and the affidavit upon which that application was founded stated that difficult questions of law would arise as to the construction of an agreement, and as to the admission of certain evidence.

A plaint having been entered in a county court, in which the plaintiff claimed "50*l*. for money had and received, &c., and on an account stated," the defendant removed the cause into the superior Court by certiorari, obtained upon an affidavit which stated that difficult questions of law

Morgan Lloyd now moved for a rule calling on the defendant to show cause why the writ of certiorari should not be granted. Upon an application to quash the writ of certiorari on an affidavit, which stated that the plaint was issued for the unliquidated balance of a partnership account, and that no difficult questions of law would arise at the trial, the Court refused to interfere, on the ground, first, that the plaint described the claim to be for a specific and liquidated account; and secondly, that the Court could not decide upon motion a question which was disputed by the affidavits.

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fendant to shew cause why the writ of certiorari should not be quashed, upon an affidavit which stated that the sum sought to be recovered, and for which the plaint was issued, was for the unliquidated balance of a partnership account; and further, that no difficult questions of law would arise at the trial.—First: The subject-matter of the plaintiff's cause of action will involve the investigation of the partnership accounts, and is therefore not a matter over which a superior Court of law has jurisdiction. [*Parke, B.*—The plaintiff has framed his plaint in such a manner as to give the superior Court jurisdiction in the matter; for the plaint states the cause of action to be for a specific amount of 50*l.* The plaint ought to have been framed so as to correspond with the plaintiff's real demand.] Secondly: The plaintiff's affidavit states that no difficult question of law will arise at the trial. [*Pollock, C. B.*—The writ of certiorari was granted upon an affidavit which satisfied the learned Judge, in allowing the writ, that difficult questions of law would arise. We cannot now try that question.]

PER CURIAM (*a*).—There will be no rule.

Rule refused

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SELBY v. THE EAST ANGLIAN RAILWAYS COMPANY.

Nov. 15.

THIS was an action of debt on three bonds. The first count of the declaration stated that, after the passing of the Lynn and Ely Railway Act, 1845, and before the passing of the East Anglian Railways Act, 1847, the then Lynn and Ely Company, by virtue of their Act, by their certain writing obligatory, sealed with their common seal, (profert), bound themselves and their successors, administrators, and assigns, in the penal sum of 1600*l.*, subject to the condition that, if the sum of 800*l.* with interest should be paid on a specified day, the bond should be void. The count then assigned, as a breach of the said condition, that the defendants did not, after the passing of the East Anglian Railways Act, nor at any time before or afterwards, pay the plaintiff the sum of 800*l.*; whereby the said bond had become forfeited, &c. The defendants, being under terms of pleading issuably, craved oyer of the bond in that count mentioned, and after setting it out pleaded, "that the said supposed writing obligatory in the first count mentioned is not *their* deed," concluding to the country. The plaintiff signed judgment, on the ground that the plea was not issuable (a). By the East Anglian Railways Act, 10 & 11 Vict. c. cclxxv., it was provided, that the latter Company should be liable for all the contracts and liabilities entered into by the former Companies. An application was made before *Martin*, B., at Chambers, to set the judgment aside; but the learned Judge refused to interfere.

In the present Term (Nov. 13)

Bramwell moved for a rule calling on the plaintiff to shew cause why the judgment should not be set aside as

(a) There were similar pleas to the other counts of the declaration.

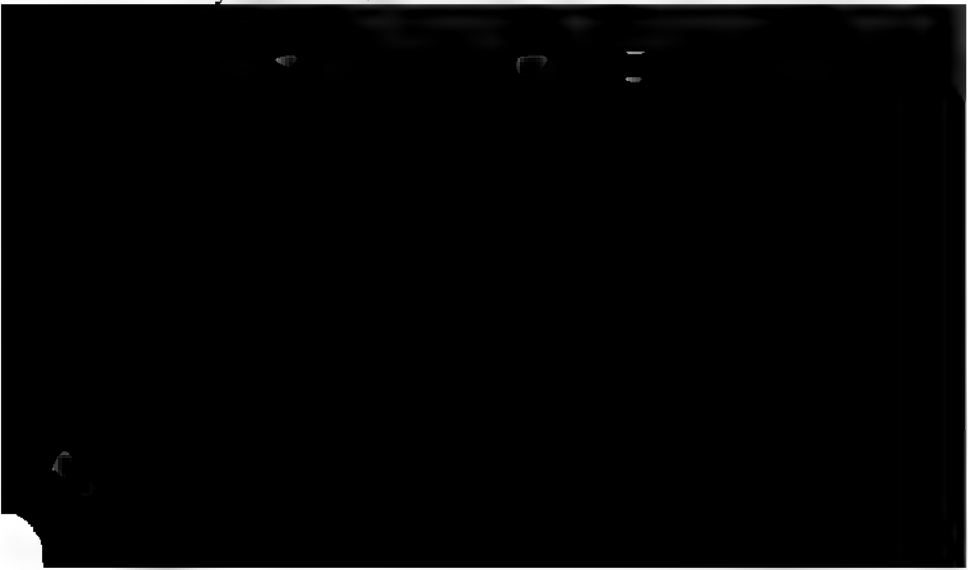
The Lynn and Ely Railway Co. entered into a bond with the plaintiff. After the bond was so given, that Company was amalgamated with other Companies; and by the Act of amalgamation it was provided, that the amalgamated Company should be liable for the contracts, &c. entered into by the former Company. In an action on this bond, the defendants (the amalgamated Company) being under terms of pleading issuably, after craving oyer of the bond, pleaded that it was not "*their* deed;" and the plaintiff thereupon signed judgment. The Court refused to grant a rule to set aside the judgment, without an affidavit of merits, it being admitted upon the application for the rule that the plea would be bad on demurrer.

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irregular.—It may be admitted that the plea could not be supported, if specially demurred to; but it is an issuable plea, and therefore the plaintiff was not entitled to sign judgment: *Eddison v. Pigram* (a). By the Act of amalgamation, the debts and liabilities of the former Companies were transferred to the Company which the defendants now represent. The bond given by the Lynn and Ely Company is in law the bond of the defendants. The plea therefore raises a substantial question, and ought to be fairly and liberally construed: *Rex v. Wright* (b).—The Court then asked the learned counsel if he would defer his application until he had obtained an affidavit of merits; but this he declined to do.

Cur. adv. vult.

POLLOCK, C. B., now said.—This was a motion to set aside a judgment signed as for want of a plea. The action was brought upon a bond into which the defendants had not entered, but upon which they were responsible; and the defendants' plea was that the said writing obligatory was not "their" deed. The defendants made no affidavit of merits; and we therefore think that there ought to be no rule. Mr. *Bramwell* admitted the plea to be bad on demurrer, but insisted, as a matter of right, that the judgment ought to be set aside. Now if the rule were



of the Court are of opinion that there is no sound reason for disturbing the judgment, and consequently that there ought to be no rule.

Rule refused.

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ROPER v. LEVY.

Nov. 24.

ASSUMPSIT for goods sold, work and labour, and upon an account stated.—Plea, except as to 4*l.* 10*s.*, parcel &c., non assumpsit; and fourthly, except as &c., that, after the accruing of the causes of action, the plaintiff levied a plaint against the defendant in the county court of Kent, holden at G., for the same causes of action as those alleged in the declaration, that he issued a summons against the defendant, that the defendant claimed to set off 14*l.*, and paid into Court 10*l.*; that certain disputes and differences having arisen and being depending between the plaintiff and the defendant of and concerning the causes of action in the declaration mentioned and the amount of the said debt or set off by the defendant, and the amount (if any) which then remained due and payable to the plaintiff on the balance of the said accounts, and the said matters in difference having respectively arisen within the jurisdiction of the said county court, and there being no other or further matter in dispute or difference between the said parties, the plaintiff and defendant mutually referred the said action in the said county court, and all matters in difference then between them, to the award, order, and arbitrament of H. Newbold and E. L. Levy, and, in case they should not agree, to G. M. Arnold, and agreed that the decisions of the said arbitrators or umpire should be final, so that the award

To an action of assumpsit for goods sold, &c., the defendant pleaded, that the plaintiff had entered a plaint in a county court for the same cause of action, and that the plaintiff and defendant mutually referred the action in the county court and all matters in difference, to arbitration, and that the umpire afterwards made his award of and concerning the matters in difference, &c.; and that the defendant had been always ready and willing &c. to perform his part of the award, &c. Replication, that the umpire did not make his award of and concerning the matters in difference:—*Held*, that the allegation


that the plaintiff and defendant mutually referred the action in the county court and all matters in difference, was supported by proof of an order of reference made by the judge of the county court, under the powers given him by the 9 & 10 Vict. c. 95, s. 77, by consent of the plaintiff and defendant.

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should be made on or before &c.; and that the said award, when made, should be entered as a judgment of the said county court in the said cause. The plea then contained an averment of mutual promises, and proceeded to state that, the arbitrators having requested G. M. Arnold to take upon himself the arbitration, he, as umpire, did so, and awarded, that the defendant should pay into the said court to the credit of the plaintiff the further sum of 4*l.* 10*s.*, and that the same should be received by the plaintiff, with the said sum of 10*l.* already paid into court, in full satisfaction and discharge of and for all the said matters in difference so referred as aforesaid. The plea then averred, that the defendant had always been ready and willing and had offered to pay into the said court to the credit of the plaintiff the said sum of 4*l.* 10*s.* in pursuance of the award, but that the plaintiff refused to receive it; and that the defendant now brings into Court the sum of 4*l.* 10*s.* ready to be paid to the plaintiff. Verification.—Replication, that the said G. M. Arnold did not make his award of and concerning the matters in difference &c., concluding to the country; and issue thereon.

At the trial, before *Martin*, B., at the Middlesex Sittings in the present Term, the defendant gave in evidence, in support of the fourth plea, an order of reference and an award. The order of reference commenced as follows:—



Judge, however, was of opinion that the plea was proved, and directed a verdict to be entered for the defendant upon the issue raised by that plea, reserving leave to the plaintiff to enter a verdict upon that issue for him.

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E. James now moved accordingly.—There is a material variance between the allegations in the plea and the evidence adduced in support of them; for the plea states that the matters in difference were submitted to arbitration by the mutual consent of the parties, but the order of reference shews the reference to have been effected by an order of the judge of the county court under the 77th section of the 9 & 10 Vict. c. 95 (a). [*Parke*, B.—The county court judge has no power under that section to make the order of reference except by consent of the parties. The agreement of the parties is the obligatory part of the transaction, which is sanctioned by the judge under the powers given him by that section. The plea is therefore supported by the evidence. *Martin*, B.—The replication merely puts in issue the *fact* that the award was made concerning the matters in difference, and does not raise the question whether the

(a) That sect. enacts, "That the judge may in any case, with the consent of both parties to the suit, order the same, with or without other matters, within the jurisdiction of the Court, in dispute between such parties, to be referred to arbitration, to such person or persons and in such manner and on such terms as he shall think reasonable and just; and such reference shall not be revocable by either party, except by consent of the judge; and the award of the arbitrator or arbitrators, or umpire, shall be en-

tered as the judgment in the cause, and shall be as binding and effectual to all intents, as if given by the judge: Provided that the judge may, if he think fit, on application to him at the first court held after the expiration of one week after the entry of such award, set aside any such award so given as aforesaid, or may, with the consent of both parties aforesaid, revoke the reference, or order another reference to be made in the manner aforesaid."

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reference was made in due form of law: *Wallington v. Dale* (a).]

PER CURIAM (b).—There will be no rule.

Rule refused.

(a) 6 Exch. 284.

(b) *Pollock, C. B., Parks, B., Alderson, B., and Martin, B.*

Nov. 24.

JOULE and Others v. TAYLOR.

By the 8 & 9 Vict. c. cxlv, the Borough Court of Manchester is empowered to try "actions of assumpsit, covenant, and debt, and actions of trespass and trover, provided the sum or damages sought to be recovered shall not exceed 50*l.* By section 52, in actions commenced "for any thing done in

CASE.—The declaration stated, that the plaintiffs heretofore, to wit, on &c., in the Court of Record of the Borough of Manchester, recovered against George Gambier a certain debt of 50*l.*, being a debt accrued to the plaintiffs within the jurisdiction of the said court; and also 6*l.* 15*s.* 8*d.*, which in and by the same court were adjudged to the plaintiffs for their damages, sustained as well on occasion of the detaining the said debt of 50*l.* as for their costs and charges by the said court there adjudged to the plaintiffs with their assent. The declaration then stated that, the said debt and damages being unpaid, the plaintiffs afterwards prosecuted out of the said court a writ of fieri facias directed to the defendant, then and still being

ed was afterwards, to wit, on &c., delivered to the defendant, then being such serjeant &c., to be executed in due form of law. Breach, that although a reasonable time for the execution of the said writ had elapsed, and although there were within the jurisdiction of the Court goods and chattels of G. Gambier, of which the defendant might have levied the said money; yet the defendant, not regarding &c., did not nor would within a reasonable time &c. levy the same monies, or any part thereof, but so to do has at all times wholly neglected and refused; and afterwards and before the commencement of this suit, to wit, on &c., falsely and deceitfully returned to the said writ that G. Gambier had not any goods and chattels within the jurisdiction of the Court whereof he could cause to be made the said debt and damages.

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Second plea.—That the record of the Borough Court of Manchester was as follows:—The plea then set out the record in the action of *Joule v. Gambier*; the declaration in which commenced by stating, that the defendant was summoned to answer the plaintiff in an action of debt, and that he demanded of the defendant 50*l*. It then stated, that the defendant was indebted to the plaintiff in 50*l*. for goods sold and delivered, and in 50*l*. for money due on an account stated, whereby an action accrued to the plaintiffs to demand and have from the defendant the said sum of 50*l*. The record then set out a confession of the debt, and concluded with a judgment in the following terms:—“Therefore it is considered that the plaintiffs do recover against the defendant their said debt, and also 6*l*. 15*s*. 8*d*. for their damages, which they have sustained as well on occasion of the detaining the said debt of 50*l*., so acknowledged as aforesaid, as for their costs and charges by the court here adjudged to the plaintiffs, and with their assent. And the defendant in mercy” &c.—Verification by the record.

Last plea.—That the grievances were committed by the

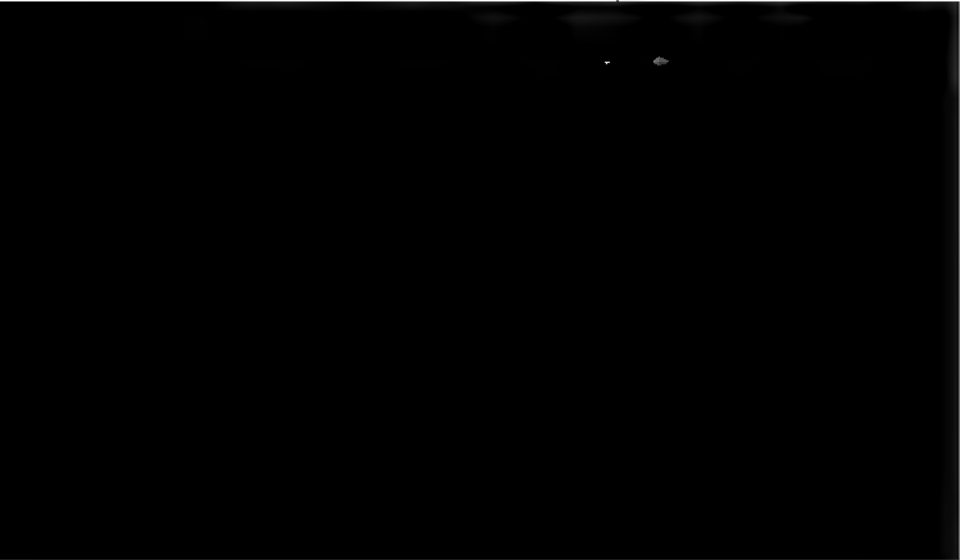
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defendant after the passing of the 8 & 9 Vict. c. cxlv., for establishing a Court of Record for the Borough of Manchester; that the grievances were done in pursuance of the said Act, and that no notice was given to the defendant before the commencement of this suit. Verification.

Replication to the second plea.—That the debt sought to be recovered in the action so brought by the plaintiff against G. Gambier in the Court of Record of Manchester, was the sum of 50*l.* and no more; and that no damages were sought to be recovered by the plaintiffs in the said action over and above their costs and charges by them about their suit in that behalf expended, except or other than such damages as were necessary for the purpose of enabling the plaintiffs to obtain and recover their said costs of the said action; nor were such damages as aforesaid recovered by the plaintiffs in the said action for any other purpose than that of obtaining and recovering their said costs of the said action. Verification.

General demurrer to the last plea, and joinder therein. General demurrer to the replication, and joinder therein.

Milward argued for the plaintiff (Nov. 12).—The questions depend upon the statute 8 & 9 Vict. c. cxlv., for regulating the Court of Record within the Borough of Manchester. By the 12th section of that Act, the council are empowered



process to him, in all respects in which a sheriff of a county is responsible for the act, negligence, misconduct, mifeasance, or nonfeasance of his bailiff or officer," &c. The word "nonfeasance" is important with reference to the 52nd section, which enacts, "That all actions and prosecutions to be commenced against any person, for anything done in pursuance of this Act, shall be commenced within two years after the fact committed, and not afterwards or otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action." The serjeant-at-mace is not entitled to notice of action under that section, for his omission to levy is not "anything done in pursuance of that Act," but something omitted to be done. The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, contains a similar clause (section 133); and in *King v. Burrell* (a), which was an action for a penalty against an overseer for neglecting to sign the burgess list, the objection that the defendant was entitled to notice of action, was abandoned as untenable. [*Pollock*, C. B.—I doubt whether notice can ever be necessary where the action is for a penalty, because, if the act complained of, whether of omission or commission, be penal, it cannot be considered as done in pursuance of the statute. *Parke*, B.—A thing is considered to be done in pursuance of a statute, when the person who does it is acting honestly and bonâ fide, either under the powers which the Act confers or in discharge of the duties which it imposes.] Where the words "omitted to be done" are not found in a clause of this description, the right to notice is limited to "things done." [*Parke*, B.—What can the clause refer to except the misconduct of an officer like the defendant?] It may have reference to the judge committing for a contempt, or to officers taking larger fees than allowed (section 51), or to the penalty imposed on the registrar for acting improperly

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(a) 12 A. & E. 460.

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(section 52), or to the case of fines imposed on jurors for non-attendance (section 21). The distinction, as regards notice of action, between acts of omission and commission, has been often recognised. In *Umphelby v. M'Lean* (a), which was an action for money had and received, to recover the amount of an excessive charge made by the defendants as collectors under a distress for arrears of taxes, it was held that the defendants were not entitled to notice of action under the 43 Geo. 3, c. 99, s. 70, which provides that no writ or process shall be sued out for *anything done* in pursuance of that Act till after one month's notice. Lord *Ellenborough* there said, "From the words of the Act, I am clearly of opinion that it does not apply to a case of this description; all the expressions refer to some act done or fact committed. There must be a positive act done: in this case there was neither act done nor fact committed." *Davis v. Curling* (b), will perhaps be relied on by the other side. That was an action against a surveyor of highways, for having allowed gravel to remain on a highway, so as to cause an obstruction; and it was held that he was entitled to notice of action under the 5 & 6 Will. 4, c. 50, s. 109, which requires notice for "anything done in pursuance of or under the authority of" the Act. That decision, however, proceeded on the ground that the act complained of was not one of omission only, but was a tort committed by

the Municipal Corporation Act (5 & 6 Will. 4, c. 76), enacts, that the Court "shall have authority to try actions of assumpsit, covenant, and debt, whether the debt be by specialty or on simple contract, and all actions of trespass or trover for taking goods and chattels, provided the sum or damages sought to be recovered shall not exceed 50*l*." The word "sum" means the "debt;" and as that may be recovered to the amount of 50*l*., exclusively of costs, it may also be recovered exclusively of the mere nominal damages, which, in an action of debt, are necessary to carry costs. The word "damages," in the Act, means, where the action sounds in damages. [He was then stopped by the Court.]

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Crompton contra.—First. The defendant was entitled to notice of action. The act complained of is a tort committed by the officer in the execution of his duty. He is charged with having omitted to levy, and also with having made a false return. That is one transaction, the main part of which consists of the making a false return. In *Davis v. Curling*, the tort was less an act of commission than in the present case; but there Lord *Denman*, C. J., said, "It is clear that the defendant is charged with a tort committed in the course of his official duty: he is charged, as surveyor, with the positive act of leaving the gravel on the road, where it had been improperly placed for an unreasonable time." So here the defendant, having received the writ, leaves the goods unseized, and makes a false return. *Wightman*, J., in *Davis v. Curling*, points out the distinction, with respect to notice, between such a case and an action for money had and received, or an action for a penalty. [*Platt*, B.—In *Wright v. Horton* (a), *Wood*, B., ruled that, in an action for a penalty under the 18 Geo. 2, c. 20, for acting as a magistrate without a proper qualification, no notice of action was necessary under the 24 Geo. 2, c. 44.—*Parke*, B.—*Smith v. Shaw* (b) resembles the present case. That

(a) Holt, N. P. 458.

(b) 10 B. & C. 277.

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was an action against the treasurer of a Dock Company, established by Act of Parliament, for an injury done to a vessel by reason of improper directions having been given by the dock-master in transporting her into the docks; and it was held, that the giving of such directions was a thing done in pursuance of the statute, so as to render notice of action necessary.]

Secondly.—The replication to the last plea is bad. The Court has no jurisdiction unless the debt or damages sought to be recovered do not exceed 50*l*. Here the plaintiff has recovered 50*l*. and a sum in addition. [*Parke, B.*—Suppose a debt, originally 50*l*., remained at interest for so long a period that the interest amounted to 100*l*., could that be recovered?] It could not. The word “sum,” in the Act, means the aggregate amount of debt and damages. In *Dempster v. Purnell (a)*, a declaration in a sheriff’s county court stated, that the defendant, within the jurisdiction of the court, was indebted to the plaintiffs in 1*l*. 19*s*. 6*d*. for goods sold and delivered, and in 1*l*. 19*s*. 6*d*. for money found to be due on an account stated, which said *several sums* were to be respectively paid by the defendant to the plaintiff on request, whereby an action accrued to the plaintiff to demand and have of and from the defendant the said *several sums* respectively amounting to 1*l*. 19*s*. 6*d*.; and it was held, that a demand exceeding 40*s*. appeared on

have jurisdiction to an unlimited amount where interest was due for a number of years.

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Milward in reply.—In *Dempster v. Purnell*, the declaration deviated from the ordinary form by not stating in its commencement the amount for which the plaint was levied. If it had done so, the plaintiff could not have recovered beyond that amount. Here the commencement of the declaration shews, that the plaintiff's claim was limited to 50*l*. The damages form no part of the "sum sought to be recovered," which means the "*debt*" for which the action is brought. The section must be construed reddendo singula singulis, the word "sum" applying to the action of debt, and the word "damages" to actions of assumpsit or covenant. Where the plaint is for a certain amount, and the declaration contains a count on a contract for the same amount, a subsequent count on another contract for a different amount may be rejected as surplusage: *Crumpton v. Smith* (a). In Buller's *Nisi Prius* (b) it is laid down, that in the action of debt "the plaintiff is to recover the sum *in numero*, and not to be repaired in damages, as he is in those actions which sound only in damages, such as assumpsit, &c." Also in 1 Wms. Saund., 33 d, n. (2), it is said, that in debt "the judgment is to recover the debt, and the damages are merely ancillary." There are numerous authorities to shew that the sum recovered by the verdict is the debt for which the action is brought: *Younger v. Wilsby* (c), *Shaddick v. Bennett* (d), *Drew v. Coles* (e), *Baddley v. Oliver* (f), *Fairbrass v. Pettit* (g). Interest is not recoverable as a *debt*, unless there is a contract either express or implied to pay it: *Higgins v. Sargent* (h).—Then as to the question of notice, the declaration would be good if the

(a) Yelv. 5.

(b) Page 167.

(c) 6 Taunt. 452.

(d) 4 B. & C. 769.

(e) 2 C. & J. 505.

(f) 1 C. & M. 219.

(g) 12 M. & W. 453.

(h) 2 B. & C. 352.

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charge of making a false return were struck out. The plea should have been confined to that part of the breach: it is bad as professing to answer the whole cause of action, when in truth it answers but a part. *Lawson v. Dumlin* (a) is also an authority in the plaintiffs' favour.

Cur. adv. vult.

POLLOCK, C. B., now said—The question raised by the demurrer to the last plea depends upon whether notice of action was necessary under the 8 & 9 Vict. c. cxlv. We think that such notice was necessary, and consequently the last plea is good. The declaration alleges not only a neglect to levy, but also the making a false return. Much of the argument turned upon the question, how far notice of action was necessary in a mere case of nonfeasance; but, inasmuch as in this case part of the cause of action is for making a false return, which is clearly a misfeasance, it appears to us unnecessary to decide whether or no, under any circumstances or which might arise out of a mere nonfeasance, notice would be necessary. In *Smith v. Shaw* (b) it was held, that notice of action was necessary, although the act done was altogether wrong. The doctrine laid down in that case applies to the present. There is also a case of *Wallace v. Smith* (c) to the same effect. We think, therefore, that the last plea is good, and there will be judgment

1851.

BLUCK *v.* GOMPERTZ.

Nov. 15.

LUSH had obtained a rule in this case, under the 14 & 15 Vict. c. 99, calling on the plaintiff to shew cause why the defendant or his attorney should not be at liberty to inspect and take copies of the two bills of exchange mentioned in the declaration, and also of a letter or memorandum in writing of the 19th of March, 1851, written by the defendant, and addressed to the plaintiff. It was an action of assumpsit on a guarantee. The declaration stated in substance, that one M. C., by the defendant as his agent, had bargained and agreed with the plaintiff to purchase of him certain hogsheads of wine for the sums of 200*l.* and 150*l.*; and that thereupon, in consideration that the plaintiff at the request of the defendant would at his own cost obtain two papers duly stamped respectively, and would on the said papers respectively make his two bills of exchange in writing, and direct the same to the said M. C., and thereby respectively require him, six months after the date thereof, to pay to the plaintiff the said prices or sums respectively, and would deliver the said bills of exchange to the defendant, the defendant promised the plaintiff to get the said bills of exchange accepted by the said M. C., and to see that they were duly paid. The declaration then averred, that the plaintiff obtained the stamped papers, and made and directed the bills of exchange to M. C. &c., and delivered them to the defendant; and alleged as a breach, that although the defendant got the bills accepted by M. C., and that although the bills were duly presented to M. C. for payment, they were not paid by him, and that the defendant did not see the bills paid. To this declaration the defendant pleaded non assumpsit. The affidavit of the defendant, upon which the rule was obtained, stated that the deponent believed the bills of exchange and the letter or memorandum relating thereto, mentioned in the declaration, to be in

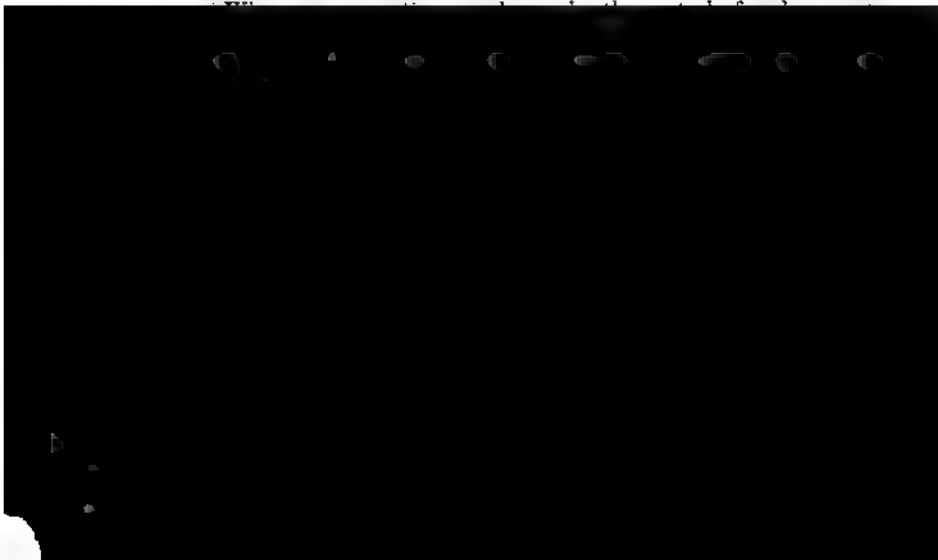
The Court has power, independently of the 14 & 15 Vict. c. 99, to compel the plaintiff to produce for the defendant's inspection a document upon which the action is brought, where the defendant is a party to the document and has no copy of it.

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the plaintiff's custody, and that the deponent never had a copy of the letter; and that he believed that the letter was not to the purport, nor did it state the consideration alleged in the declaration, but that, if produced at the trial, it would tend to establish the defence to the action; and that the deponent was advised and believed, that it was necessary for the deponent's attorney to be informed of its true nature, in order to prepare the defence to the action. An application had been made to *Martin, B.*, at Chambers, for the inspection of these documents; however, that learned Judge had refused to interfere, and had referred the parties to the Court.

Welsby now shewed cause.—The plaintiff does not object to an inspection by the defendant of the bills of exchange mentioned in the declaration, but he contends that, under the circumstances, the Court has not any power to grant an inspection or copy of the letter or guarantee. The 14 & 15 Vict. c. 99, s. 6 (a), upon which this application is founded, expressly enacts, that the Courts may compel the inspection to be granted and a copy to be taken of documents, in those cases only “in which, previous to the passing of this Act, a discovery might have been obtained by

(a) That section enacts, that, documents in the custody or un-



filing a bill or by any other proceeding in a Court of equity at the instance of the party." A Court of equity would not have interfered in the present case, where the applicant's object is not to obtain evidence in support of his case, but merely for the purpose of finding defects in that of his adversary. In *Bolton v. The Corporation of Liverpool* (a) Lord Brougham says, "I take the principle to be this:—A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's. . . . The plaintiff does not claim anything positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title; they are the corporation's title, and not his; and they are only his negatively by failing to prove that of the corporation. He rests on the right which he has in common with all mankind to be exempt from dues and customs; and he says, 'Prove me liable, if you can.' The corporation have certain documents which, they say, prove his liability. He cannot call for these documents merely because they may, on inspection, be found not to prove his liability, and so help him, and hurt his adversary whose title they are." The same rule may be found laid down in *Lady Shaftesbury v. Arrowsmith* (b) and *Combe v. The City of London* (c). The defendant here seeks the inspection of this guarantee, that he may see whether the document be not open to some technical objection. [*Pollock*, C. B.—If he finds it to be unobjectionable, he may perhaps at once satisfy the plain-

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(a) 1 Myl. & K. 88.

(b) 4 Ves. 66.

(c) 4 Y. & C. 139.

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tiff's demand. *Parke, B.*—Is not this a case in which the Courts have power to grant an inspection of this document altogether independently of the statute? The application is founded entirely upon the statute, and the plaintiff is not under any implied duty to grant the inspection. [*Parke, B.*—It has for many years past been the practice of the superior Courts to grant inspection of all instruments upon which a plaintiff seeks to charge the party who has executed the instrument, where there is only one copy of it; and that is upon the ground, that the party who has possession of it holds it as trustee for the other party. In such case it is but just that the other party should be allowed to see it. A distinction was formerly made by Mr. Justice *Bayley* in the case of bills of exchange, the reason of which I never could understand; but of late years the Courts have been more liberal. *Alderson, B.*—I have granted numerous applications like the present at Chambers previously to the statute; and the statute was not passed for the purpose of limiting, but of extending, our jurisdiction in these matters. It frequently occurs at Chambers, that an application is granted to inspect a bill of exchange upon which the action is brought, where the defendant's affidavit impugns the authenticity of his signature upon the bill.] No doubt an inspection would be allowed where the genuineness of the document itself is impeached. But in

"Nothing can be plainer than the principles on which this right of production and discovery depends. Unhappily each case presents a new application of those principles, on which there appears to be much more difference of opinion than I should have imagined to have existed. But let us see on what the principle does depend. A party has a right to compel the production of a document in which he has an equal interest, though not equal in degree, yet to a certain extent equal with the party who detains it from him. In that case he may file a bill of discovery, in order to have the possession of it and the inspection of it. A party has also a right to file a bill of discovery for the purpose of obtaining such facts as may prove his case; and, if those facts are either in possession of the other party, or if they consist of documents in possession of the other party, in which he has either an interest, or which tend to prove his case and have no relation to the case of the other party, he has a right to have them produced; and he may file a bill of discovery in order to aid him in law or in equity to exhibit those documents in evidence, or compel a statement of those facts."]

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Lush, in support of the rule, was stopped by the Court.

POLLOCK, C. B.—There appears to be no doubt that, before the passing of the recent statute, this Court would have granted an inspection and copy of this document. This statute gives us the same powers as Courts of equity had before the passing of the statute; and I think a Court of equity would have allowed an inspection. We are, therefore, right in allowing the application, either under the statute or independently of it.

ALDERSON, B.—In *Inman v. Hodgson* (a), *Alexander*, C. B.,

(a) 1 Y. & J. 28.

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said, "It would be a very formidable proposition to lay down, that every party might look into documents in the possession of his adversary, without shewing that he was *interested* therein." That implies that a party may inspect a document in which he is interested; and in the present case the defendant is himself a party to the instrument which he is desirous of inspecting.

PARKE, B., concurred.

Rule absolute.

Nov. 24.

RYAN v. SHILCOCK.

A landlord, in order to distrain, may open the outer door by the usual means adopted by persons having access to the building, and therefore he may open it by turning the key, by lifting the latch, or by

CASE for an illegal distress. The declaration contained a count in trover. Plea, not guilty by statute; and issue thereon.

At the trial, before *Parke, B.*, at the Middlesex Sittings in last Trinity Term, it appeared that the plaintiff being tenant to the defendant of certain premises including a stable, which was a detached building, and rent being in arrear, the defendant entered the stable and seized a chattel as a distress. Upon the stable door was a padlock at



and to enter a verdict for him for the sum of 6*l.*, being the value of the chattel seized.

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In Trinity Term last, *Humfrey* obtained a rule nisi accordingly.

Fortescue shewed cause (November 18).—First, it is admitted that neither can the sheriff in the execution of civil process, nor a landlord in making a distress, *break* open the outer door of a dwelling-house; but they are justified in opening the outer door without violence, by adopting the means ordinarily used by persons seeking access to the interior of the building. The authorities are but scanty upon this precise question: *Semayne's case* (a), and *Duke of Brunswick v. Slowman* (b), were decided upon the principle that the outer door cannot be broken open. It appears from the 3rd resolution in *Semayne's case*, that “the breaking,” to constitute an illegal entry, must be a breaking with *violence*; and reference is made to 18 E. 2(a), Execut. 252, where it is said, that the king's officer, who comes to do execution, &c., may open the doors which are shut, and break them, if he cannot have the keys. In Com. Dig. “Execution,” C. 5, it is indeed said, that a sheriff cannot open the door although it be only latched, but no authority is cited for that position. [*Parke*, B.—In Co. Litt. 161. a., it is laid down that a landlord cannot break open gates, or break down inclosures to make a distress.] The observation of Lord Coke must be understood with reference to the question of what constituted a disseisin, and not as to the landlord's power to distrain. And in Vin. Abr. “Distress,” E. 2, the passage is cited with the words “fling open,” instead of break open. *Waterhouse v. Saltmarsh* (c) may be relied upon by the plaintiff, but that case has no bearing on the present. It appears from the

(a) 5 Rep. 91; 1 Smith's L. C. 39. (b) 8 C. B. 317. (c) Hob. 263.

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authorities, when carefully considered, that "the breaking" of the outer door, to be illegal, must be effected by violence; but there is no authority that the landlord is not entitled to enter the premises, for the purpose of distraining, by turning the key, by drawing a bolt, by raising a latch, or by any other means usually adopted by the tenant.

Secondly.—Assuming the door to have been broken open, the landlord was justified, upon the ground that the maxim that "a man's house is his castle" does not apply to a detached building like that entered by the defendant. *Brown v. Glenn* (a) is no doubt an authority that a landlord cannot break the outer door of any building; but that case directly overrules *Penton v. Browne* (b), which decided that a barn or out-house not connected with the dwelling-house may be broken open. [*Parke, B.*—There is also a third question in the present case,—whether, assuming the entry by the defendant to be contrary to law, the distress is altogether void, or whether the distress is good, and the defendant is liable in trespass for the wrongful entry. In *Semaine's case*, it is said that, "In 18 E. 4, 4, a, by Littleton and all his companions, it is resolved that the sheriff cannot break the defendant's house by force of a fi. fa.; but he is a trespasser by the breaking, and yet the execution which he doth in the house is good." A very able note is to be found upon that passage in Smith's Leading

dividual, who is allowed to take the law into his own hands. The rule, as respects the landlord, is this,—that he can enter the house only when the door is open. If the door be closed, he is not justified in opening it, either by force or by the ordinary means used by the tenant. This rule is a simple one, and the safest. Fitz. Abr. tit. “Distress,” pl. 21, is an express and distinct authority that the landlord cannot open a door kept closed by a bolt, by inserting his finger into a hole in the door and by withdrawing the bolt. Com. Dig. “Execution,” E. 5, already referred to, is also an authority that the distress is void. *Brown v. Glenn* is a recent and express authority upon the second point.—They also referred to *Wallace v. King* (a).

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Cur. adv. vult.

POLLOCK, C.B., now said—In this case the question turned upon the power of a landlord to make a distress, that is, how far he was justified in making an entry into premises, for which purpose he used no more force than was necessary to open the outer door, which was shut to keep the door closed only, and not to keep people out. According to the evidence in the present case, the door had on it a padlock with a staple; but the mode by which the owner and every one else opened the door in order to obtain admittance was, by pulling out the staple, which served much in the same way as a button or nail does, which is sometimes to be found used for keeping gates “shut,” an ambiguous term, and meaning either a mode of preventing a door from opening of itself, or from being opened by force or violence, or by such persons as have the key or some other means of opening the door. The jury found, upon the question being expressly put to them, that the padlock and staple were not for the purpose of keeping the door fastened, but merely closed; and as it is no part of

(a) 1 H. Bla. 13.

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the present question whether the verdict was against the evidence, the question is reduced to this, namely, whether a landlord, who on coming to his tenant's premises for the purpose of distraining finds the outer door closed, but capable of being opened by lifting a latch, is justified in so doing. We are of opinion that the landlord has authority by law to open the door in the ordinary way in which other persons can do it, when it is left so as to be accessible to all who have occasion to go into the premises. In 1st Inst. 161. a., Lord Coke, in commenting upon Littleton, explains the meaning of the term "inclosure," to be found in the 137th section, in the following words: "Inclosure . . . for the lord cannot break open the gates, or break down the inclosures to take a distress; and therefore the law accounts it a disseisin." Now, if these two matters be taken together, inasmuch as breaking down the inclosures would clearly be a forcible entry, we think that the breaking open the gates must be understood to be such a breaking as is also equivalent to a forcible entry; for Lord Coke proceeds to say: "But all these are intended by Littleton to be disseisins after an actual seisin had, and when the rent is behind; otherwise none of these are disseisins at all." Now, there is a passage in Fitzh. Abr. tit. "Distress," pl. 21, which was much relied upon by the plaintiff. "Nota, that a man came to the sta-

move the fastening of the door or window, and so gains admittance into the premises, which no doubt amounts to both a burglary and trespass, as such is not the accustomed mode of obtaining admittance into the premises. The passage from Lord Coke is a direct authority in favour of the defendant; and that from Fitzherbert, when examined, turns out to be so also. We may observe that, as to the passage referred to during the argument in Com. Dig. "Execution," that the sheriff may not open a latch, there is no reference to any authority in support of it; and it is clear that the cases cited do not support that proposition. However, that passage applies only to a sheriff entering a *dwelling-house* under an execution. As the rule will be discharged on this ground, it therefore becomes unnecessary to express any opinion upon the other questions in the case.

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Rule discharged.

HEWITT v. Sir C. ISHAM, Bart.

Nov. 7.

TRESPASS for breaking and entering the plaintiff's closes, drawing trees and timber over them, laying trees and timber there, and digging pits therein.

Plea, (inter alia) leave and license.

At the trial, before *Maule*, J., at the last Northamptonshire Assizes, it appeared that the plaintiff was tenant to the defendant of a farm under a parol demise, which contained, amongst others, the following stipulation:—"All the hedges, trees, thorn bushes, fences, with the lop and top, are reserved to the landlord." The trespass complained of was, that the defendant's workmen entered upon the farm in question, and, having cut down some trees, dug saw-pits in the land, for the purpose of sawing the timber. In support of the above plea, the de-

A parol demise of land reserved to the landlord "all the hedges, trees, thorn bushes, fences, with lop and top:"—*Held*, that such reservation operated as a license to enter the land for the purpose of cutting and carrying away the trees.

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defendant gave some evidence of the acts having been done by the plaintiff's permission, but relied principally upon the above-mentioned stipulation in the demise. This evidence was objected to by the plaintiff, but received by the learned Judge, who directed the jury that the stipulations in the lease afforded evidence of leave and license. The jury having found a verdict for the defendant—

Humfrey moved to set aside the verdict, and for a new trial, on the ground of the improper reception of this evidence, and also for misdirection.—The stipulation in the demise was not evidence of leave and license, but amounted to a reservation, and should have been so pleaded. In Bro. Abr., "Lease," fol. 58, p. 30, and "Licence," fol. 64, p. 19, reference is made to the Year Book, M. 5 H. 7, fol. 1, p. 1, where, in a case of *Lord Dudley v. Powles*, the plaintiff's counsel, arguing against the sufficiency of a plea of leave and license, says: "As if one would plead in trespass, that the plaintiff had licensed him to enter and occupy for the space of a month or quarter of a year, such a plea in that case would not be good, but he ought to say that the plaintiff leased to him, and not that he licensed him, for the matter that follows does not prove a license, but a lease." And the reporter adds, "And this was granted to him by the Court, and note." The reservation in cases

question cannot operate as a grant; but the law will construe it in some way so as to effectuate the intention of the parties. Had it been by deed, the law would have construed it as a grant, and have implied a right to go upon the land for the purpose of cutting and carrying away the trees. But as the reservation is by parol, it will only operate as a license, to the same extent as if it had been a grant. The learned Judge was therefore correct in telling the jury that this was evidence of leave and license, and that it was competent for them to find that issue for the defendant.

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PARKER, B.—I am also of opinion that the learned Judge was right. This stipulation could not operate as a grant or an easement, because it is not under seal. It can only operate as a license. In *Liford's case* (a), it was resolved, "that when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him and them who would buy a power, as incident to the exception, to enter and shew the trees to those who would have them: for, without sight, none would buy; and, without entry, they could not see them." So that, according to the authority of that case, wherever trees are excepted from a demise, there is, by implication, a right in the landlord to enter the land, and cut the trees at all reasonable times. If, indeed, he leaves them on the land for an unreasonable time, he does more than the law authorises him to do. But here there was no evidence of that.

ALDERSON, B., and PLATT, B., concurred.

Rule refused.

(a) 11 Rep. 51 b.

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Nov. 7.

RICHARD HEWITT v. MACQUIRE.

Trespass for breaking and entering the plaintiff's dwelling-house, and seizing his goods. Plea, that T. recovered a judgment against H., and thereupon issued a writ of *fi. fa.* directed to the sheriff, who made and delivered his warrant to the defendant, a bailiff, to be executed, by virtue of which writ and warrant the defendant, as bailiff, seized the goods of H. in the plaintiff's dwelling-house. Replication, that, although T. recovered judgment, and sued out such writ, and the sheriff made and delivered to the defendant

TRESPASS for breaking and entering the plaintiff's dwelling-house, and taking his goods.

Plea (*inter alia*):—That before the said time when &c., one Sir C. Isham, in the Court of Common Pleas at Westminster, by the consideration and judgment of the Court, recovered against one George Hewitt a debt of 45*l.* 8*s.* 8*d.*, together with 7*l.* 6*s.* 2*d.*, which in and by the said Court was then and there adjudged to Sir C. Isham for his damages, &c. And thereupon, the judgment being in full force, and the debt and damages remaining unpaid, Sir C. Isham, for the recovery thereof, afterwards and before the said time when &c., sued and prosecuted out of the Court of Common Pleas a certain writ of our lady the Queen, called a *fi. fa.*, directed to the sheriff of Northamptonshire, by which said writ our lady the Queen commanded the said sheriff, that of the goods and chattels of the said George Hewitt, in his, the sheriff's, bailiwick, he should cause to be made the said debt, &c. [The plea then set out the writ, and stated the indorsement.] And which writ so indorsed was then, and before the said time when &c., delivered to W. S., who then and at the said time when &c. was sheriff of Northamptonshire, to be executed in due

of law. That before and at the said time when &c., divers goods and chattels of George Hewitt, liable to be taken in execution in that behalf under the said writ and warrant, were in the said dwelling-house in which &c. By virtue of which said writ and warrant, the defendant did then as such bailiff, holding the said warrant, and under the authority of the same, whilst the said writ and warrant were in full force &c., enter, peaceably and quietly, into the dwelling-house in which &c., the outer door thereof being then open, in order to seize and take, and did then seize and take in execution, the goods and chattels of George Hewitt, the same then being in the said dwelling-house, for the purpose of levying the monies so directed to be levied by the indorsement on the said writ, and by the said warrant as aforesaid; and in so doing the defendant, so being such bailiff, did then necessarily and unavoidably make a little noise and disturbance in the said dwelling-house, &c., quæ sunt eadem. Verification.

Replication.—That although true it is that Sir C. Isham, in the Court of Common Pleas at Westminster, by the consideration and judgment of the Court, recovered against George Hewitt the debt and damages in the plea mentioned, and that Sir C. Isham sued and prosecuted out of the said Court such writ of fieri facias as in the plea mentioned, and directed as therein mentioned, and that the writ was duly indorsed, and so indorsed was delivered to the sheriff to be executed as in the plea mentioned, and that the sheriff made such warrant as in the plea mentioned, and delivered the said warrant to the defendant in manner and form as the defendant in his said plea hath alleged: for replication nevertheless in this behalf, the plaintiff saith, that the defendant at the said time when &c., of his own wrong, and without the residue of the cause in the plea alleged, committed the trespasses in the declaration mentioned; concluding to the country—upon which issue was joined.

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At the trial, before *Maule, J.*, at the last Northamptonshire Assizes, it appeared that George Hewitt, the son of the plaintiff, having been tenant to Sir C. Isham, was sued by him for rent, and suffered judgment by default. A writ of fieri facias issued thereon, under which the defendant, who was bailiff of the sheriff of Northampton, took in execution the goods of George Hewitt in the house of the plaintiff, to which they had been removed. The plaintiff set up a claim to the goods under a bill of sale to him from George Hewitt, and brought the present action on account of their seizure. The defence was, that the bill of sale was fraudulent and void. The warrant from the sheriff to the defendant was not proved. On the part of the plaintiff, it was objected that the defendant ought to have proved the warrant. The learned Judge overruled the objection, expressing his opinion that the delivery of the warrant to the defendant was admitted by the pleadings. A verdict having been found for the defendant,

Humfrey now moved for a new trial on the ground of misdirection.—*Carnaby v. Welby (a)* is in point. There, to an action of trespass, the defendant justified under a writ of fieri facias, and a warrant of execution delivered to him as bailiff to be executed. The plaintiff replied that, although the writ issued and the warrant was delivered to

under the writ and warrant; but my Brothers *Patteson*, *Williams*, and *Coleridge* agreed, that, on the admissions on those pleadings, there was ample evidence to connect the seizure as proved with the warrant. So here, there is some evidence for the jury that the defendant acted under the warrant, because it is admitted by the replication that he had a warrant at the time of the seizure.] It is submitted that the defendant was bound to prove the warrant. Assuming that the entry and seizure had been before the issuing of the writ and making of the warrant, how could the defendant have pleaded in any other form? [*Parke*, B.—It is admitted on the pleadings that the writ was delivered to the sheriff and the warrant to the bailiff before the committing of the trespasses. The defendant objects that the assignment was fraudulent; but no one has a right to say that the goods were the goods of the execution debtor except the execution creditor. The defendant must shew that he is in the same position as the execution creditor; that is, in an ordinary case, by proving the judgment, the delivery of the writ to the sheriff, and the warrant thereon. Here that is unnecessary, because the record admits a privity between the defendant and the execution creditor. Then, according to *Lucas v. Nockells* (a), the defendant must shew that the entry took place under the writ; and in the absence of any evidence to the contrary, the admissions on the pleadings are evidence to connect the seizure with the warrant.] If the entry under the warrant is a traversable fact, who would be bound to prove it? [*Alderson*, B.—In *Carnaby v. Welby* the Court say, that a good answer to the plaintiff's case might have been submitted to the jury; and that Lord *Abinger* would have been right, if he had told the jury that the delivery of the writ and warrant before the trespass was some evidence that the bailiff acted under them.]

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(a) 4 Bing. 729; 10 Bing. 157.

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POLLOCK, C. B.—There will be no rule, and for the reasons assigned in the course of the argument.

PARKE, B.—The defendant was bound to shew that he was clothed with the rights of an execution creditor, and that he meant to exercise those rights by that seizure. I think the fact of his entering the premises after the delivery of the warrant to him is, in the absence of any proof as to how he conducted himself, evidence that he entered under that warrant. If, indeed, the plaintiff had shewn that the defendant conducted himself in a manner contrary to what a bailiff armed with that warrant would have done, as for instance if he took the goods and gave them to some third person, that would have been evidence to rebut the presumption of the seizure having taken place under the warrant. Therefore, the present case differs from *Carnaby v. Welby*, which proceeded on the ground that Lord Abinger told the jury that a seizure under the writ was admitted by the pleadings. There, however, the Court of Queen's Bench said, that the delivery of the writ and warrant to the defendant before the trespass, was some evidence for the jury of the seizure having taken place under the writ.

ALDERSON, B.—I am of the same opinion.



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JONES v. PHILLIPS and Others.

Nov. 10.

DEBT for rates and duties payable by the defendants to certain Harbour Commissioners under a local Act of Parliament.—Pleas, except as to 4*l.* 4*s.*, never indebted, and payment of that sum into Court.

The following case was by a Judge's order stated for the opinion of this Court:

The plaintiff is the clerk to the Commissioners under an Act of Parliament for the improvement of the rivers Bury, Loughor, and Lliedi, in Carmarthenshire and Glamorganshire, and under another Act for the improvement of the said rivers and harbours of Llanelly. The port of Llanelly was constructed under the first Act, and is maintained by the Commissioners under the powers of both Acts. In pursuance of the provisions of those Acts, the Commissioners directed certain rates to be levied upon ships and goods, and affixed the following table of such rates in a conspicuous place in the harbour.

“Rates on Shipping.—For any ship or other vessel entering into the rivers Bury, Loughor, and Lliedi, or either of them, from and over the bar of Bury, 1*d.* per ton register.

“Rates on Goods.—For every ton, or less quantity than a ton, imported or exported over the bars of the said rivers Bury and Loughor, the sum of 1*d.* per ton. For every package and parcel of goods, wares, merchandise and other articles whatsoever, imported or exported, the sum of 1*d.* each.”


A portion of the trade of the port of Llanelly consists of the importing of iron and tin, and the exportation thereof in the form of tin plates, which are the manufacture of raw iron into plates of iron, and then covered with tin. When the tin and iron have been manufactured into tin plates, they are packed in wooden cases or boxes for shipment,

The 55 Geo. 3, c. clxxxiii. authorises certain Harbour Commissioners to charge a sum not “exceeding 1*d.* for every ton or less quantity than a ton, and for every package and parcel of goods, wares, merchandise, &c. exported or imported over the bars of certain rivers.” Tin-plates were exported, packed in wooden boxes for shipment, and such boxes formed part of and composed one entire quantity or shipment in one vessel (under one bill of lading), and to the same consignee, and at an uniform rate of freight on all the tin plates so shipped, such freight being paid on the quantity of tons weight:—*Held*, that the Commissioners were entitled to charge 1*d.* per package, and were not bound to charge 1*d.* per ton weight.

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and such boxes are exported, usually to the extent of many tons in the same vessel. The boxes vary in weight from 1 cwt. to 2 cwt. From the time of passing the first Act to the end of the year 1849, it is admitted that sheet copper, packed in parcels between two wooden planks screwed together, and each package weighing about 10 cwt., has been exported from Llanelly in cargoes in large quantities for above twenty years, paying harbour dues by the ton. Tin plates were first exported from Llanelly in August, 1848, and were charged harbour dues by the ton, the same as sheet copper, up to December, 1849; but such merchandise as cases of hats, bales of goods, cotton, general shop goods, &c., (if in small quantities) have always been considered as packages or parcels liable to be charged at 1d. each, under the 23rd section of the Harbour Act, even though a number of such packages were imported in the same vessel.

In January, 1850, the Harbour Commissioners determined that they were entitled to charge 1d. per box on boxes of tin plates and sheet copper, and per package on some other articles that had previously been charged by weight, although forming part of a large shipment; the Commissioners insisted that such boxes and packages were liable as such under the 23rd section of the Act. The several boxes of tin plates exported by the defendants



1*d.* per box for each box of tin plates; and if they are so entitled, the sum paid into Court is not sufficient. The tin plates are sold by the box, packed in boxes for shipment; each box contains a certain number of plates, which are of an ascertained weight per square foot. The boxes are of an uniform size, the plates also vary in thickness and in the numbers that are packed in each box.

The question for the opinion of the Court is, whether the Commissioners can legally claim 1*d.* per box harbour dues on the tin plates, or whether the sum must be charged for at the rate of 1*d.* per ton. If the Court should think the Commissioners can claim 1*d.* for each box, judgment is to be entered up against the defendants for the sum of 19*l.* 2*s.* 11*d.*; but if the Court should be of a contrary opinion, judgment is to be entered for the defendants.

Watson for the plaintiff.—The defendants are liable to pay 1*d.* for each box of tin plates, and are not entitled to be charged for several boxes at the rate of 1*d.* per ton. The question depends upon the construction of the 23rd section of the 53 Geo. 3, c. clxxxiii., “For the improvement of the navigation of the rivers Bury, Loughor and Lledi, in the counties of Carmarthen and Glamorgan.” By that section the Commissioners are authorised to demand “for every ton or less quantity than a ton, and for every package and parcel of goods, wares, merchandise, and other articles, commodities, and things whatsoever, exported or imported over the bar of the said rivers Bury and Loughor, such sum of money as the said Commissioners shall from time to time direct and appoint, not exceeding the sum of one penny for every ton or less quantity than a ton, and for every package and parcel of goods, wares, merchandise, and other articles, commodities, and things, exported or imported as aforesaid.” The true meaning of that section is, that where goods are exported or imported by bulk, the charge is to be one penny per ton; but where they are ex-

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ported or imported in packages or parcels, the charge is to be one penny per package.

The Court then called on

Peacock for the defendants.—Where a number of packages containing the same description of goods are consigned to one person, the consignee is not bound to pay a penny for each package, but only one penny for every ton weight. [*Parke, B.*—There is no absurdity in construing the statute according to its ordinary grammatical sense. If all the parcels had been packed together in one case, the defendants might, possibly, have escaped paying for each package; or if the tin plate had been sent loose, it would have been chargeable by weight, for it would have been neither packages nor parcels. The meaning of the statute is, that where goods are shipped in bulk, they are to be paid for at the rate of one penny per ton; but where they are shipped in parcels, they are to be paid for by the parcel.] For nearly twenty years a practice has prevailed of charging for these packages at the rate of one penny per ton.—He referred to *Parker v. The Great Western Railway Company (a)*.

Pollock, C. B.—There must be judgment for the plain-



PARKE, B.—I am of the same opinion, and for the reasons already given.

ALDERSON, B., and PLATT, B., concurred.

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Judgment for the plaintiff.

DOE *d.* DIXIE *v.* DAVIES.

Nov. 25.

EJECTMENT by the plaintiff as assignee of Turner, a mortgagee, against the defendant the mortgagor.

At the trial, before *Williams, J.*, at the last Glamorgan-shire Spring Assizes, it appeared that the premises, to obtain possession of which the present action had been brought, had been mortgaged in fee by the defendant to one John Turner, as a security for the sum of 1100*l.*, by a deed, dated the 9th of February, 1838; and that this mortgage had afterwards been assigned, subject only to the equity of redemption, by Turner to the lessor of the plaintiff by a deed to which the mortgagee was a party. The day of redemption stated in the mortgage deed was the 9th of February, 1839; and the deed contained the usual power of sale by public auction or private contract in default of the payment of the sum secured, subject to the following proviso: "Provided always, nevertheless, and it is hereby declared and agreed, and he the said John Turner doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said David Davies (the defendant), his heirs, executors, administrators, and assigns, that no sale or public notice, or advertisement of or for any sale of the said premises or any part thereof, shall be made or given by the said John

An indenture of mortgage, after the usual power of sale by public auction or private contract in the event of the nonpayment of the mortgage-money, contained a proviso and covenant by the mortgagee that no sale, or public notice or advertisement for any sale, should be made or given, nor any means be taken for obtaining possession, until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mortgagor. It also contained a covenant by the mortgagee for quiet enjoyment by the mortgagor, as tenant at will to

the mortgagee, on the payment of a certain yearly rent by two equal half-yearly payments, but no livery of seisin was made to the mortgagor:—*Held*, that, under this deed, the mortgagor was tenant at will only to the mortgagee, and no tenancy from year to year was thereby created.

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Turner, his heirs, executors, administrators, or assigns, nor any means by him or them be taken for obtaining possession of the same premises or any part thereof, until the expiration of twelve calendar months after notice in writing of his or their intention to sell or obtain possession thereof shall have been given to the said David Davies, his heirs, or assigns, or left at his or their last or usual place of abode." The mortgage deed also contained the following covenant:—"And the said John Turner doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, grant, and agree with and to the said David Davies, his executors, administrators, and assigns, that he the said David Davies, his executors, administrators, and assigns, shall and may peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuages or tenements, lands, and hereditaments, with the appurtenances, as tenant or tenants thereof *at will* to the said John Turner, his executors, administrators, and assigns, he the said David Davies, his executors, administrators, and assigns, yielding and paying for the same to the said John Turner, his executors, administrators, and assigns, yearly and every year, the clear annual sum of 55*l.*, by two even and equal half-yearly payments in the year, and on such days and times as is hereinafter mentioned, for and in lieu, satisfaction, and discharge of the like annual sum

leave to the defendant to move to set that verdict aside, and to enter a verdict for him.

In the present Term (Nov. 18),

Davison and *Bowen* shewed cause.—Under the mortgage deed in question, the defendant was a mere tenant at will. The first clause does not operate as a re-demise of the premises for any term certain, and the second clause treats Turner and his assignee expressly as mere tenants at will. Such being the effect of the deed, the tenancy at will was determined by the assignment, to which the tenant was himself a party.

Grove in support of the rule.—The language of the second clause in the deed, which has been principally relied upon, does not create a tenancy at will. The deed creates either a tenancy from year to year, or a tenancy determinable by a twelve months notice. The intention of the parties, to be gathered from the whole instrument, is not inconsistent with such a tenancy. The reservation of a yearly rent is in favour of this position: *Richardson v. Langridge* (a). [*Parke*, B.—The reservation of a yearly rent is not inconsistent with a tenancy at will: Co. Litt. 556; and in *Walker v. Giles* (b) it was held, that a clause in a mortgage, that the mortgagors should become tenants to the mortgagees of the demised premises during their will at a yearly rent, was held not to create a yearly tenancy.] That decision proceeded on the ground that such a tenancy was inconsistent with the obvious intention of the parties, as it appeared upon the face of the instrument. So here the expression “tenant at will” is inconsistent with the intention of these parties. No such rule of law exists as to preclude parties from creating tenancies of this description. In *Kemp v. Derrett* (c) Lord *Ellenborough*,

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(a) 4 Taunt. 128. (b) 6 C. B. 662. (c) 3 Camp. 510.

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C. J., held, that an agreement, by which a tenant is always to be subject to quit at three months notice, is a quarterly tenancy determinable on a three months notice to quit, expiring on the same day that it commenced or any other day. This deed therefore created a tenancy which was to be determinable only on a twelve months notice to quit being given.

Cur. adv. vult.

POLLOCK, C. B., now said,—In this case we are of opinion that the rule which has been granted to enter a verdict for the defendant ought to be discharged.

The question turns on what sort of interest the lessor of the plaintiff had in the premises in question by reason of the indenture of the 9th of February, 1838. That was an indenture of mortgage, containing certain provisos, and it was contended that it created in the defendant an interest that could not be put an end to without a notice to quit. Now the judgment of the Court must depend upon the construction to be put on two clauses in that indenture. The first is as follows:—[His Lordship, after stating it, proceeded.] The mortgagor, therefore, under this clause holds at the will of the mortgagee, but is not thereby rendered tenant at will to him; for, in order to constitute that relation, the tenancy must be determin-



will; and that will having been determined by the assignment, to which the mortgagor was himself a party, this ejectment was well brought. The verdict is therefore right, and this rule must be discharged.

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Rule discharged.

PABROTT and Another, Assignees of LOVE, an Insolvent,
 v. ANDERSON.

Nov. 15.

CASE for an excessive distress.—Plea, not guilty.

At the trial, before *Maule*, J., at the Northamptonshire Summer Assizes, it appeared that the insolvent Love was tenant to the defendant of a farm, of which the latter was mortgagee; and that, in July 1850, Love was indebted to the defendant in the sum of 146*l.* for rent due on the preceding Lady-day. In August, 1850, a receiver of the rents having been appointed for the estate, his agent, one Faux, took from Love, on account of the rent so due, a bill of exchange at four months date, for 146*l.* Faux indorsed the bill over to a banker, who debited him with the amount; and he subsequently paid to the receiver 146*l.*, giving credit for it in his accounts, as if the money had been actually paid to him by Love. The bill of exchange was dishonoured; and Love having taken the benefit of the Insolvent Act, the defendant, in June, 1851, distrained his goods for rent, including the 146*l.*, whereupon the assignees brought the present action. The learned Judge having expressed an opinion that the plaintiffs were not entitled to recover, it was arranged that they should be nonsuited, leave being reserved to them to enter a verdict for 80*l.*, if, upon the facts of the case, the learned Judge ought to have directed a verdict for them.

A tenant being indebted to his landlord for rent, the agent of the landlord received from the tenant a bill of exchange for the amount, which he indorsed to a third person, and afterwards paid the rent to the landlord, giving credit for it in his accounts as if the tenant had paid money. The landlord having distrained for the rent:—*Held*, that it was a question for the jury, whether the transaction amounted to a discount of the bill by the agent for the tenant, or a mere advance of the rent by the agent to the landlord, in which latter case he was entitled to distrain.

Humfrey moved accordingly (Nov. 7th).—The defendant

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had no right to distrain, for he had been paid the rent by his agent. The latter could not recover back the money from the defendant, consequently his claim was satisfied. [Pollock, C. B.—The tenant cannot take advantage of such a payment. Suppose the steward of a landholder took bills of exchange for rent, and then remitted the amount to the landholder, might he not distrain if the bills were dishonoured? Alderson, B.—If the defendant himself had received the bill of exchange, and it was afterwards dishonoured, could not he have distrained?] In that case there would be no payment of the rent. [Parke, B.—Is not the defendant liable to refund, on the ground that the money was paid by the agent under a mistake of fact?] The transaction amounts to a payment by the defendant with money lent him by the agent. [Pollock, C. B.—Suppose the agent had sent the money to the defendant without taking any bill from the tenant, would that have made any difference? Parke, B.—It is a question of fact whether this payment by the agent was a loan to the tenant, or whether the money was advanced by the agent to the landlord. A similar point arose in a case of *Griffiths v. Chichester* (a).] The tenant's liability has been altered by the indorsement of the bill. He is now liable to two different persons in respect of the same debt. [Parke, B.—*Davis v. Gyde* (b) is an authority to shew that the receipt

paid; but if it was only an advance of the rent by the agent to the landlord, then he was entitled to distrain.

Cur. adv. vult.

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POLLOCK, C. B., now said,—In this case there will be no rule. The judgment of the Court was suspended with a view to consult my Brother *Maule*, who tried the cause; and he reports that he was requested to leave the matter to the jury only if he could tell them that they must find a verdict for the plaintiff. In the course of the argument, a case of *Griffiths v. Chichester* was referred to, in which a similar point arose and was decided by this Court. The merits, therefore, in point of law, are clearly with the verdict of the jury and the direction of the Judge; but if anything turns upon the view which the learned Judge took, he reports to us that he acted as he was requested to do; and consequently we are satisfied with the verdict.

Rule refused (*a*).

(*a*) GRIFFITHS v. CHICHESTER.

THIS was an action of trespass for breaking and entering the plaintiff's close, and seizing his crops. The defendant pleaded (*inter alia*) that the plaintiff was tenant to the defendant of the close in question, at the yearly rent of 110*l.*, payable on the 24th of June and the 24th of December; and that, on the 24th of December, 1848, the sum of 110*l.* was due for one year's rent, wherefore the defendant took the crops as a distress. Replication, that the plaintiff was paid the sum of 110*l.* after the rent became due, and before the time of the distress.—Issue thereon.

At the trial, before *Williams*, J., at the Worcestershire Summer Assizes, 1850, it appeared that the plaintiff had mortgaged a farm to the defendant, as a security for the sum of 2,400*l.* The mortgage deed, after reciting that the plaintiff had attorned and became tenant to the defendant of the premises in question, at the yearly rent of 110*l.*, contained a demise of the premises to the plaintiff at the above rent, payable on the 24th of June and 24th of December. There was a covenant by the plaintiff to pay interest at the rate of 4½ per cent. "on the days and times and in manner thereafter mentioned;" and then followed a covenant by the plaintiff to pay the rent on the

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24th of June and 24th of December. The first half year's rent, due on the 24th of June, 1848, was paid to the defendant on the 4th of July by Messrs. Higgins & Chamberlain, who acted as solicitors for both plaintiff and defendant. The half year's interest, due on the 24th of December, 1848, was also paid by Messrs. Higgins & Chamberlain, on the 21st of February, 1849. Those payments were made without any previous authority from or subsequent ratification by the plaintiff. On the 29th of March, 1849, the defendant distrained the plaintiff's goods for the 110*l.* so paid. The learned Judge left it to the jury to say, whether the payment made by Messrs. Higgins & Chamberlain was a payment on behalf of the plaintiff, or an advance in the course of business to the defendant, at the same time telling them, that if they believed that the interest had been paid, the rent had been paid. The jury found a verdict for the plaintiff, damages 10*l.*; and leave was reserved for the defendant to move to enter a verdict for him.

Whateley moved accordingly, and also for a new trial, on the ground of misdirection (November 4th, 1850).—First, the payment of interest by Messrs. Higgins & Chamberlain, having been made without any authority, did not in point of law discharge the debt. Secondly, the mortgage deed does not upon the face of it identify the rent with the interest. Under such a form of deed, the plaintiff is liable at law for both interest and rent, though the defendant would be bound to account in equity. If the defendant had brought an action of covenant for the rent, it would have been no answer to say, that the interest had been paid. [*Parks, B.*—The language of the covenant is, that the plaintiff will pay interest “in manner hereinafter mentioned,” that is, by way of rent. The only question was, whether the payment was made on behalf of the plaintiff, or by way of advance to the defendant; and that question was properly left to the jury.]

MICHAELMAS VACATION, 15 VICT.

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The ATTORNEY-GENERAL *v.* BRADBURY & EVANS.

Dec. 1.

THIS was an information filed by the Attorney-General against the defendants, to recover penalties from them in respect of an unstamped newspaper printed by them, as set forth in the information, and also to recover stamp duties in respect of the same. The information contained counts for penalties of 20*l.* each under the 6 & 7 Will. 4, c. 76, and counts for duties and on an account stated. The defendants having pleaded nil debent to the information, and issue having been joined thereon, by consent of the Attorney-General and the defendants, and by order of *Parke, B.*, the following case, of which the information was to form a part, was stated for the opinion of this Court:—

The alleged newspaper in the said information mentioned is a paper containing, amongst other things, public news, intelligence, and occurrences, and called “The Household Narrative of Current Events” (of which a copy annexed forms a part of the case). The defendants knowingly and wilfully printed, and caused to be printed, the said alleged newspaper on paper not duly stamped, if any stamp was required. The said paper was so printed and caused to be printed, for the purpose of being dispersed and made public by sale in the ordinary way to any person desirous of purchasing it, and was so printed for sale in the ordinary way. The said paper was published periodically, at intervals exceeding twenty-six days between the publication of every two numbers, and did not exceed two sheets of the dimensions specified in the Schedule (A.) to the 6 & 7 Will. 4, c. 76, and was published for sale for a less

A publication containing public news, printed and published in the United Kingdom, for sale, for less than 6*d.*, exceeding one sheet and not exceeding two sheets of paper of the dimensions of twenty-one inches in length and seventeen inches in breadth, (in whatever way or form divided into leaves, or in whatever way printed), and published periodically in parts or numbers, at intervals exceeding twenty-six days, is not liable to stamp duty under the 6 & 7 Will. 4, c. 76, Sched. (A.)—Per *Pollock, C. B., Platt, B., Martin, B.*; dissentiente *Parke, B.*

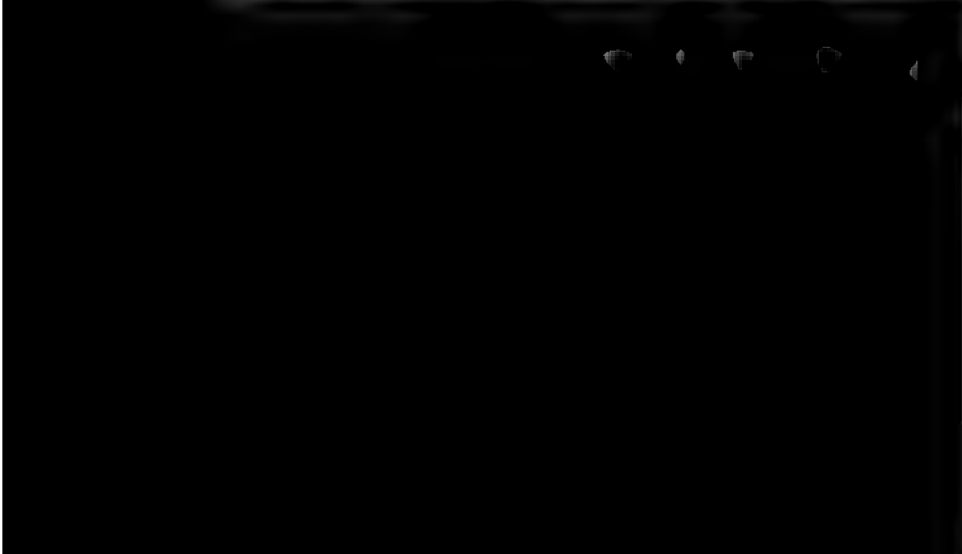
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sum than sixpence, exclusive of the duty (if any) by the said Act imposed thereon.

The question for the opinion of the Court was, whether the said paper so printed and published is a newspaper chargeable with the duties imposed by the 6 & 7 Will. 4, c. 76. If the Court should be of opinion that the said paper was a newspaper chargeable with the said duties, then judgment was to be entered for the Crown upon all or any of the counts of the said information, and for such sums as the Court should think fit. But if the Court should be of the contrary opinion, a *nolle prosequi* was to be entered.

The points for argument on the part of the Crown were as follows:—That the paper in question, being a paper containing public news, intelligence, and occurrences, printed in Great Britain to be dispersed and made public, is a newspaper within the 6 & 7 Will. 4, c. 76, chargeable with the duties imposed by that Act.

The defendants' points for argument were:—That "The Household Narrative" falls only within the third description of papers in the Schedule to the 6 & 7 Will. 4, c. 76, as being a periodical published for sale; and that being published in parts or numbers at intervals of twenty-six days between the publication of any two numbers, it is therefore not subject to stamp duty; that the third description in the Schedule is that which alone applies to and governs



price, to be chargeable with the duty, does, by necessary inference, shew the intention of the legislature, that only the papers of that class which have such intervals of publication, dimensions, and price shall be so chargeable.

The case was argued in last Easter Term (May 7) by

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The *Attorney-General* (*Crompton* with him) for the Crown.—The question turns upon the true construction of the 6 & 7 Will. 4, c. 76, Schedule (A) (a). It must be admitted by the defendants, that the publication in ques-

(a) That Schedule contains the duties by the Act imposed on newspapers, and after specifying the same proceeds as follows, viz.—

“And the following shall be deemed and taken to be newspapers, chargeable with the said duties, viz.—

“Any paper containing public news, intelligence, or occurrences, printed in any part of the United Kingdom, to be dispersed and made public:

“Also any paper printed in any part of the United Kingdom weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements:


“And also any paper containing public news, intelligence, or occurrences, or any remarks or observations thereon, printed in any part of the United Kingdom for sale, and published periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers, where any of the said papers, parts, or numbers re-

spectively shall not exceed two sheets of the dimensions hereinafter specified (exclusive of any cover or blank leaf, or any other leaf upon which any advertisement or other notice shall be printed) or shall be published for sale for a less sum than 6*d.*, exclusive of the duty by this Act imposed thereon: Provided always, that no quantity of paper less than a quantity equal to twenty-one inches in length, and seventeen inches in breadth, in whatever way or form the same may be made or may be divided into leaves, or in whatever way the same may be printed, shall, with reference to any such paper, part, or number as aforesaid, be deemed or be taken to be a sheet of paper:

“And provided also, that any of the several papers hereinafter described shall be liable to the duties by this Act imposed thereon, in whatever way or form the same may be printed or folded, or divided into leaves, or stitched, and whether the same shall be folded, divided, or stitched, or not.”

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tion, which is a record of the events of the past month down to the very day on which the work appears, is a publication containing "news, intelligence, or occurrences, to be dispersed or made public," within the first clause of the Schedule; but the defendants will contend, that the first clause is controlled by the third contained in the Schedule, and consequently, that as this publication is not published within the periods prescribed by the third clause, the publication is exempt from duty. But such a construction of the Schedule would in effect render the first clause unnecessary. The Schedule, in truth, contains three distinct and separate clauses, each of which has reference to a distinct class of publications. This is clear from the several Acts which have been passed from time to time upon this subject. The first Act is the 10 Anne, c. 19, the 101st section of which imposed a duty upon newspapers; and it may be observed, that under this Act "The Spectator" was subjected to duty as a pamphlet; of which tax a grievous complaint is to be found in the 445th number of that periodical (*a*). This statute was followed by the 30 Geo. 2, c. 19; 13 Geo. 3, c. 65; 16 Geo. 3, c. 34; 29 Geo. 3, c. 50; 34 Geo. 3, c. 72; 37 Geo. 3, c. 90; 38 Geo. 3, c. 78; 44 Geo. 3, c. 98 (consolidating the stamp duties); and the 55 Geo. 3, c. 185. All the foregoing statutes adopt the same language. Then came the 60 Geo. 3. & 1 Geo. 4, c. 9, which was



newspaper. That section therefore contemplated a new class of publications, and one entirely distinct from such as are ordinarily termed newspapers; but the statute was not intended to, and in fact did not, repeal the provisions of any prior enactment with reference to newspapers. The object of the legislature in passing this statute was the repression of these publications, as being of a mischievous and dangerous character. The 60 Geo. 3 & 1 Geo. 4, c. 9, was not intended to abridge, but on the contrary to extend, the operation of the 55 Geo. 3, c. 185. It appears that the first clause of the Schedule to the 6 & 7 Will. 4, c. 76, is contained in the first set of Acts prior to the 60 Geo. 3 & 1 Geo. 4, c. 9; and that the third clause is, for the first time, to be found in the last-mentioned statute. If, then, the present question had arisen shortly after the passing of the 55 Geo. 3, c. 185, there is no doubt that this publication would have been subject to duty. The argument for the Crown is simply this, that the Schedule to the 6 & 7 Will. 4, c. 76, has reference to separate and distinct classes of publications, and that the third clause does not control the first. The words "and also," which are prefixed to each clause, add weight to this argument, for they are cumulative; and consequently, that clause cannot be so construed as in effect to repeal the prior clause.

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Peacock (*Willes* with him) for the defendants.—The general rule of construction, which ought not to be lost sight of, that, in the construction of statutes which impose a duty upon the subject, the statute must be strictly construed, applies to the present case: *Denn v. Diamond* (a). In other words, if such a statute as the present admits of any reasonable doubt, that meaning is to be adopted which is most favourable to the subject. If the argument for the Crown be correct, any book containing the smallest

(a) 4 B. & C. 243.

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particle of news is subject to duty, for the statute is not confined to publications which contain one sheet only, but it imposes a duty upon each separate sheet. Therefore, the "Annual Register" or the "Quarterly Review," and many other works which contain some information of a novel description, must fall within the Act. Now, it may be admitted that the present work is a newspaper; but the Legislature has expressly said, that such a paper, published at intervals exceeding a certain period, is not liable to duty. This work no doubt may be said to contain some news, as in the case of a chronological table published at the end of the year. But, if the argument for the Crown be correct, any work containing news, though inserted merely in a note, would be subject to duty. The general words of the Schedule are restrained by the particular words, according to the well-known rule of construction which is constantly acted upon in the interpretation of all written instruments: *Bac. Abr. tit. Stat. (H.), Rex v. The Archbishop of Armagh (a)*, Dwarris on Statutes, 621. With respect to the several Acts referred to it may be observed, that the "Spectator" was taxed as a "pamphlet" under the 10 Anne, c. 19, sect. 101. By the 55 Geo. 3, c. 185, "pamphlets" were subject to duty, provided they did not exceed a certain number of sheets,

for that purpose, defined the precise period of publication. If the statute of Anne, and that class of statutes prior to the 60 Geo. 3 & 1 Geo. 4, c. 9, applied generally to papers published at intervals exceeding twenty-six days, the 60 Geo. 3 & 1 Geo. 4, c. 9, was altogether superfluous.

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The *Attorney-General* replied.

Cur. adv. vult.

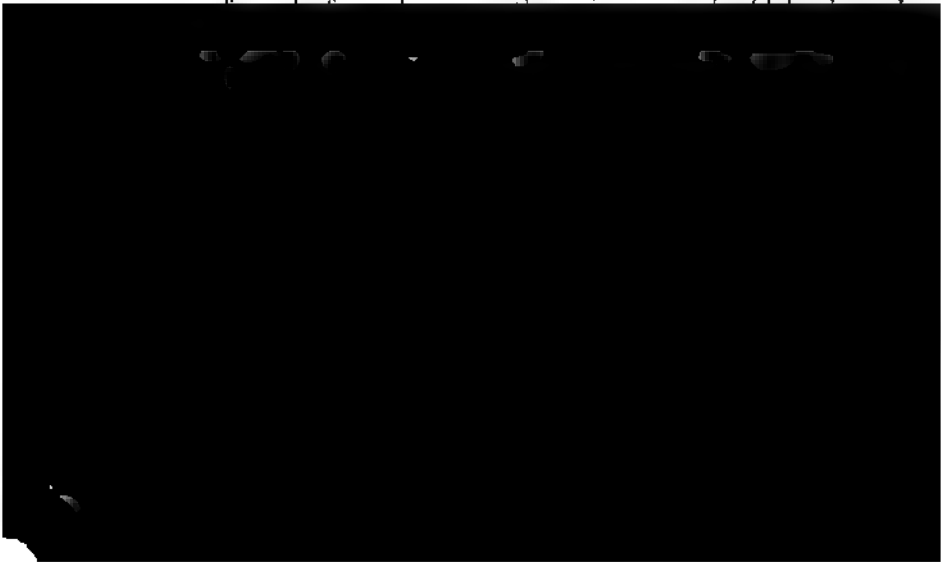
The learned Judges, differing in opinion, now proceeded to deliver their judgments seriatim :

MARTIN, B.—I am of opinion that the defendants are entitled to the judgment of the Court. The question upon which the judgment depends is, whether a publication called “The Household Narrative of Current Events” is subject to the newspaper duty imposed by the stat. 6 & 7 Will. 4, c. 76. The publication is a paper which contains public news. It is printed and published in London for sale, for less than sixpence, and contains not more than two sheets, and is published in parts or numbers at intervals *exceeding* twenty-six days. The first statute which imposed a duty upon newspapers was the 10 Ann. c. 19, s. 101. The subject upon which the duty was imposed was declared to be “newspapers, or papers containing public news, intelligence, or occurrences,” which (within a limited time therein mentioned) “should be printed, to be dispersed and made public.” This statute expired, but the duty continued to be imposed by several subsequent statutes, and the subject of the duty continued to be described by the same words. The 55 Geo. 3, c. 185, which was the statute imposing the duty which immediately preceded the present existing statute, 6 & 7 Will. 4, c. 76, made use of the same identical language as that used in the statute of Anne. The ordinary understanding of the word “newspaper” is, a publication containing a narrative of recent events and occurrences, published regularly at short intervals from time to time; and that the publishing at short

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intervals has been always deemed essential in order to constitute a newspaper, is evident from the circumstance that the Annual Register, which professes to be published shortly after the 31st of December in every year, and to contain an account of all public events and occurrences up to that day, has never, I believe, been supposed to be subject to the newspaper duty; and yet it seems to be in no way distinguishable from a newspaper, except in the greater interval between its publications.

Now, what the interval is within which a paper must be published, in order to constitute it a newspaper, is obviously a matter quite indefinite and uncertain; but in my opinion, so far as stamp duty is concerned, this uncertainty was remedied, and was intended so to be, by the statute of 60 Geo. 3 & 1 Geo. 4, c. 9. By this statute, after reciting that pamphlets and printed papers containing observations upon public events and occurrences, tending to excite hatred of the Government and constitution, had lately been published in great numbers and at very small prices, it was enacted, that all pamphlets and papers containing any public news, intelligence, or occurrences, printed for sale and published periodically at intervals *not exceeding twenty-six days*, when the pamphlets or papers should not exceed two sheets, or should be published



shall be deemed and taken to be newspapers within the stamp laws—viz. papers containing public news, published at intervals not exceeding twenty-six days; and in my opinion no publication is to be deemed a newspaper liable to stamp duty, unless it be published at an interval of or less than twenty-six days, notwithstanding it professes to contain the news or occurrences of the day of, or immediately preceding, the publication.

This view seems to me to be confirmed by the 4th section of the 60 Geo. 3 & 1 Geo. 4, c. 9, which, in my judgment, points out the distinction intended by the legislature to be made between papers published at an interval of twenty-six days and papers published at a greater interval. By this section it was enacted, that pamphlets and papers containing public news, intelligence, or occurrences, printed for sale and published periodically at intervals exceeding twenty-six days, and not exceeding two sheets, and published for sale at a less price than sixpence, should be published on the first day of every calendar month, or within two days before or after that day, and at no other time; and any person publishing such pamphlets or papers at any other time was subject to a penalty of 20*l*. Now, "The Household Narrative" falls precisely within the above description; and if the question of its liability to stamp duty had arisen before the 6 & 7 Will. 4, c. 76, was passed, I should have thought that it was not subject to duty within the 55 Geo. 3, and 60 Geo. 3 & 1 Geo. 4, but was subject to the regulations contained in the 4th section above mentioned. If this be the correct view of the law anterior to the 6 & 7 Will. 4, c. 76, and which I believe it to be, I have no difficulty whatever in holding that there is no duty payable by virtue of this statute. This Act was to reduce the duty on newspapers, and I am quite satisfied that no paper not subject to duty before that Act either was or was intended to be subjected thereto by it. For the above reasons I am of opinion that the


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defendants are entitled to the judgment of the Court in their favour.

PLATT, B.—This was an information filed by her Majesty's Attorney-General, charging the defendants with having knowingly and wilfully printed a newspaper on paper not duly stamped, and seeking to recover from them the penalty of 20*l.* imposed by the 6 & 7 Will. 4, c. 76, s. 17. The information also contained counts under the 16th section of the same Act, for and in respect of divers newspapers by the defendants printed and published in Great Britain on paper not duly stamped.

The publication alleged to be a newspaper within the Act of Parliament was intitled "The Household Narrative of Current Events," from the 30th of March to the 26th of April, and related the proceedings in the Houses of Parliament and Courts of law, and other events of public interest which had occurred during that period; but it was a part or number of a publication published periodically in parts or numbers at intervals exceeding twenty-six days, and did not exceed two sheets of paper of the dimensions of twenty-one inches in length and seventeen inches in breadth, and was published for sale for a less sum than sixpence. The *Attorney-General*, on the part of the Crown, contended that it was chargeable with the



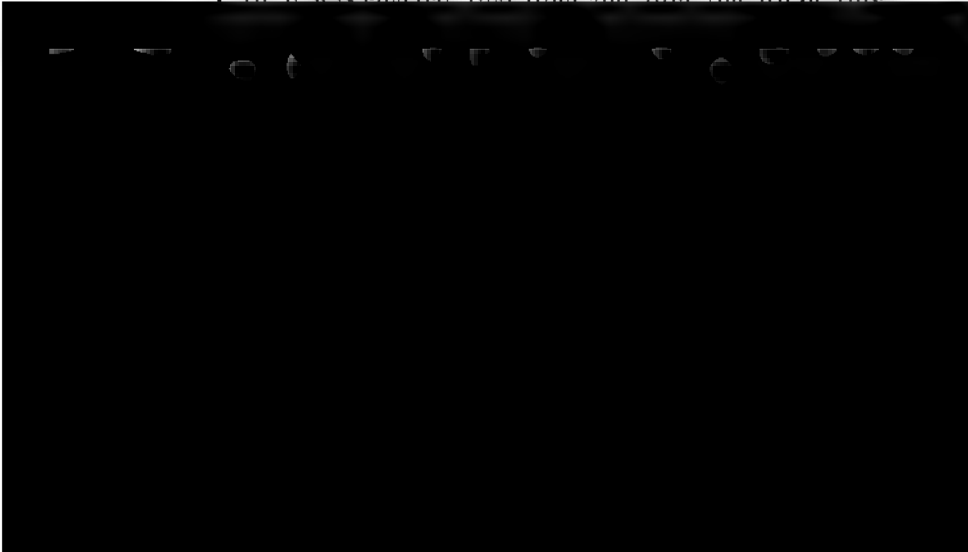
subjects of taxation: "all books and papers commonly called pamphlets, and all newspapers or papers containing public news, intelligence, or occurrences, which shall be printed in Great Britain to be dispersed and made public;" and exacts "for every such pamphlet or paper contained in half a sheet or lesser piece of paper one halfpenny. For every such pamphlet or paper (larger than half and not exceeding one whole sheet) one penny for every copy. For every pamphlet or paper being larger than one whole sheet, and not exceeding six sheets in octavo or in a lesser page, or not exceeding twelve sheets in quarto, or twenty sheets in folio" 2s. for every sheet "contained in *one* printed copy thereof. For every advertisement twelve pence." "The Household Narrative" exceeds one whole sheet and not six sheets, and would have fallen within the third class. The next statute in order is the 11 Geo. 1, c. 8, passed A. D. 1724. By the 1st section, after reciting (amongst other things) that the authors or printers of several journals, mercuries, and other newspapers did, with intent to defeat the payment of the duty granted by the 10 Anne, c. 19, and in fraud of the Crown, so contrive as to print their said journals and newspapers on one sheet and a half sheet of paper each, and by that means they neither paid the duties of one penny for each sheet, nor a halfpenny for the half-sheet, but entered them as pamphlets, and paid only 3s. for each impression thereof; it was enacted and declared that such journals, mercuries, and newspapers printed on one sheet and half-sheet of paper should not, for the future, be deemed pamphlets. And by the 2nd section, from the 25th of April, 1725, there should be paid for every sheet of paper on which any journal, mercury, or other newspaper whatsoever should be printed, a duty of one penny sterling, and for every half-sheet thereof the sum of one halfpenny sterling.

By the 30 Geo. 2, c. 19, s. 1, A. D. 1757, was imposed for

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and upon every newspaper or paper containing public news, intelligence, or occurrences, printed in Great Britain to be dispersed and made public, whether the same be contained in half a sheet or any less piece of paper, or in any other paper larger than half a sheet *and not exceeding one whole sheet*, over and above all other rates and duties by an Act made in the tenth year of the reign of her late Majesty Queen Anne or by any other Act imposed, an additional duty of one halfpenny. By the 13 Geo. 3, c. 65, A.D. 1773, after reciting that doubts had arisen whether journals, mercuries, chronicles, or other newspapers printed on more than one sheet and a half of paper might not be entered as pamphlets and pay only 3s. for each impression thereof, instead of the duty chargeable on each sheet of each copy thereof, it was enacted and declared, that the duties charged by the 11 Geo. 1, c. 8, and the 30 Geo. 2, c. 19, on journals, mercuries, and other public newspapers, were meant and intended, and did extend, to charge with the said duties respectively every sheet and every half sheet of paper on which any journal, mercury, chronicle, or other public newspaper or paper containing public news, intelligence, or occurrences, were or should be printed, whether they should be contained in a greater or less number of sheets or half-sheets. By the 16 Geo. 3, c. 34, s. 7, A.D. 1776, it was enacted, that from and after the 5th of July




or occurrences, printed in Great Britain to be dispersed or made public, whether the same be contained in half a sheet or any less piece of paper, or in any paper larger than half a sheet and not exceeding one whole sheet, upon every sheet and half-sheet thereof there should be charged, over and above all other rates and duties by any Act of Parliament imposed, an additional duty of one halfpenny. The 34 Geo. 3, c. 72, A.D. 1794, authorises the Commissioners of Stamps to stamp single demy paper with the stamp for half a sheet; and by the 2nd section prescribes the limit of the size of the sheet of single demy to twenty-eight inches in length and twenty inches in breadth. The 37 Geo. 3, c. 90, s. 2, A.D. 1797, imposes for and upon every newspaper or paper containing public news, intelligence, or occurrences, printed in Great Britain to be dispersed and made public, whether the same be contained in half a sheet or any less piece of paper, or in any paper larger than half a sheet, the sum of one penny halfpenny. The 44 Geo. 3, c. 98, s. 22, A.D. 1804, prohibits the printing of any newspaper or paper containing public news, intelligence, or occurrences, to be dispersed and made public, on any paper exceeding thirty-two inches in length and twenty-two inches in breadth, and the Commissioners from stamping with the stamp denoting the duty on newspapers any such paper. And the Schedule (B) to that Act specifies, for pamphlets or books, or papers, commonly so called, (being larger than one whole sheet and not exceeding six sheets octavo or on a lesser page, or not exceeding twelve sheets in quarto, or twenty sheets in folio), printed in Great Britain, for every sheet of any kind of paper which shall be contained in one copy thereof, 2s. The Schedule to the 55 Geo. 3, c. 185, A.D. 1815, is as follows:—
 “ Newspaper or paper containing public news, intelligence, or occurrences, printed in Great Britain to be dispersed and made public, that is to say, for every sheet, half-sheet, or other piece of paper whereof the same shall consist, 4d.

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Pamphlets, or books, or papers commonly so called, printed and published in Great Britain, containing one whole sheet and not exceeding eight sheets in octavo or any lesser page, or not exceeding twelve sheets in quarto, or twenty sheets in folio, for every sheet of any kind of paper contained in one copy thereof, 3s. And all parts or numbers of any book or literary work published in parts or numbers, exceeding one whole sheet but not exceeding eight sheets in octavo or any lesser page, or not exceeding twelve sheets in quarto, or twenty sheets in folio, shall be deemed pamphlets." By these Acts, papers falling under the denomination of newspapers are made liable to one duty, and books or papers falling under the denomination of pamphlets to another. And as the new enactment introduced into the 55 Geo. 3, c. 185, for the purpose of extending the latter duty to parts or numbers of books or literary works published in parts or numbers, tends to shew that, before the passing of that Act of Parliament, such publications were not deemed by the legislature to have been liable to any duty, it may be fairly inferred that pamphlets and books or papers commonly so called were not liable to duty upon more than one copy, although the subjects of relation or discussion therein might correspond with those related or discussed in an ordinary newspaper. The language is remarkable. The literary work must at-



A.D. 1819, after reciting that pamphlets and printed papers containing observations upon public events and occurrences tending to excite hatred and contempt of the Government and constitution of these realms as by law established, and also vilifying our holy religion, had lately been published in great numbers and at very small prices, and it was expedient that the same should be restrained, enacts, that “from and after ten days after the passing of this Act all pamphlets and papers containing any public news, intelligence, or occurrences, or any remarks or observations thereon, or upon any matter in Church or State, printed in any part of the United Kingdom for sale, and published periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two of such pamphlets or papers, parts or numbers, where any of the said pamphlets or papers, parts or numbers respectively shall not exceed two sheets, or shall be published for sale for a less sum than sixpence, exclusive of the duty by this Act imposed thereon, shall be deemed and taken to be newspapers within the true intent and meaning of” (amongst others) the 55 Geo. 3, c. 185. It may be fairly inferred from the terms of this enactment, that, until the 9th of January, 1820, all pamphlets and papers containing public news, intelligence, or occurrences, or any remarks or observations thereon, printed in any part of the United Kingdom for sale, and published periodically, or in parts or numbers, were not liable as newspapers to the stamp duty, and that the legislature thereby first imposed that burthen upon such of them only as should be published periodically at intervals not exceeding twenty-six days, and should not exceed two sheets, or be published for sale for a less sum than sixpence. “The Household Narrative” would not have fallen within the definition of the new subject of newspaper taxation, as the interval between the publication of two successive numbers would have exceeded the limit prescribed. The 6 Geo. 4, c. 119, and 3 & 4 Will. 4,

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c. 23, did not alter the law as regarded the character of such publications as the one in question. They however assist in shewing the course of pamphlet and newspaper taxation. The 6 Geo. 4, c. 119, s. 1, A.D. 1825, after reciting that it was expedient to remove the restrictions which prevented the printing of newspapers upon paper not exceeding thirty-two inches in length and twenty-two inches in breadth; and that it was expedient to allow supplements to newspapers, containing advertisements only, to be subjected to a stamp duty not exceeding half of the stamp duties then payable on newspapers, and to allow papers not containing public news, intelligence, or occurrences, but containing only or principally advertisements, to be printed and published periodically, subject to the like reduced stamp duty, enacts, that "from and after the commencement of this Act, any newspaper or paper containing public news, intelligence, or occurrences, shall and may be printed and published in Great Britain upon a single sheet or piece of paper duly stamped, although such sheet of paper shall exceed thirty-two inches in length and twenty-two inches in breadth, and whatever size such sheet or piece of paper may be;" and that it shall be lawful for the Commissioners to stamp the same. By the 2nd section it is enacted, that there shall be paid the stamp duty following, namely, "For every supplement to any

duty imposed by the 55 Geo. 3, c. 185, on pamphlets. And the 3rd section is in these words:—"In order to provide for the collection of the duty by this Act granted on advertisements contained in or published with any pamphlet, literary work, or periodical paper, one printed copy of every pamphlet or literary work or periodical paper, (not being a newspaper)," i. e. not falling within the 60 Geo. 3 & 1 Geo. 4, c. 9, s. 1, "containing or having published therewith any advertisement or advertisements liable to stamp duty, which shall be published within the cities of London, Edinburgh, or Dublin, respectively, or within twenty miles thereof respectively, shall, within the space of six days next after the publication thereof, be brought, together with all advertisements printed therein or published or intended to be published therewith, to the head office for stamps in Westminster, Edinburgh, or Dublin, nearest to which such pamphlet, literary work, or periodical paper shall have been published, and the title thereof, and the christian name and surname of the printer and publisher thereof, with the number of advertisements contained therein or published therewith."


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Such having been the previous enactments upon the subject, the 6 & 7 Will. 4, c. 76, repeals the 60 Geo. 3 & 1 Geo. 4, c. 9, and in a schedule describes what papers shall be deemed and taken to be newspapers chargeable with the duties, thus:—First, "Any paper containing public news, intelligence, or occurrences, printed in any part of the United Kingdom, to be dispersed and made public." Secondly, "Also any paper printed in any part of the United Kingdom weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements." Thirdly, "And also any paper containing any public news, intelligence, or occurrences, or any remarks or observations thereon, printed in any part of the United Kingdom for sale, and published periodically or in parts or numbers at intervals not exceeding twenty-six days be-

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tween the publication of any two such parts, papers, or numbers, where any of the said papers, parts, or numbers respectively shall not exceed two sheets of the dimensions hereinafter specified, (exclusive of any cover, or blank leaf, or any other leaf upon which any advertisement or other notice shall be printed,) or shall be published for sale for a less sum than sixpence, exclusive of the duty by this Act imposed thereon. Provided always, that no quantity of paper less than a quantity equal to twenty-one inches in length and seventeen inches in breadth, in whatever way or form the same may be made or may be divided into leaves, or in whatever way the same may be printed, shall, with reference to any such paper, part, or number as aforesaid, be deemed or taken to be a sheet of paper."

The introduction of the third description seems to me to shew that the extensive construction which her Majesty's *Attorney-General* sought to put on the first description cannot be maintained. That construction would render so much of the third as relates to papers containing public news, intelligence, or occurrences, wholly unnecessary. But construing it as the legislature at the time of passing the 60 Geo. 3 & 1 Geo. 4, c. 9, appears to have construed the then existing law, the operation of which they were then extending, the third description would have a distinct operation, as a partial re-enactment of the 1st section of



twelve months. The language of the former Acts excludes the notion of such publications having been deemed newspapers. The 11 Geo. 1, c. 8, shews what, in 1724, was deemed a newspaper. It is there described as as journal, mercury, or other public newspaper. The 13 Geo. 3, c. 65, passed in 1773, describes it as journal, mercury, chronicle, or other public newspaper. Register or magazine does not find a place in any of the enactments on this subject. The "Gentleman's Magazine" has, ever since January, 1731, been published monthly in parts, and although it has uniformly recorded amongst other things the public events and occurrences of the preceding month, no one ever dreamt of its being taxable as a newspaper.

The publication in question is either a pamphlet, or a paper as contradistinguished from a pamphlet. As a pamphlet it is not chargeable with any duty—the 3 & 4 Will. 4, c. 23, having taken off the duty imposed by the 55 Geo. 3, c. 185, and the 6 & 7 Will. 4, c. 76, the duty imposed on pamphlets by the 60 Geo. 3 & 1 Geo. 4, c. 9, s. 1. I am not satisfied it is not a pamphlet. But assuming it to be a paper as contradistinguished from a pamphlet, I find that, as a paper containing public news, intelligence, and occurrences, printed in the United Kingdom for sale, it does not exceed in dimensions two sheets of paper twenty-one inches in length and seventeen inches in breadth, and that it is published for sale for a less sum than sixpence; but that it is published periodically in parts or numbers at intervals exceeding twenty-six days between the publication of any two such papers, parts, or numbers.

As, therefore, "The Household Narrative" would not have fallen within the definition given in the 1st section of the 60 Geo. 3 & 1 Geo. 4, c. 9, and been liable as a newspaper to a duty, so is it in my judgment, according to the true construction of the schedule appended to the 6 & 7 Will. 4, c. 76, excluded from that liability. I think, therefore, the judgment of the Court should be given for the defendants.

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PARKE, B.—I think that in this case the Crown is entitled to our judgment. The question turns upon the true meaning of the first and third of three clauses in the schedule of the 6 & 7 Will. 4, c. 76. I agree to the rule laid down in *Denn d. Manifold v. Diamond(a)*, that a tax cannot be imposed on the subject except by words clearly shewing the intention of the legislature to do so; but I think that the terms used in this Act of Parliament are sufficiently plain, and shew the intention of the legislature clearly enough, and especially when read in conjunction with those of the prior Acts on the same subject. The duty, by the 6 & 7 Will. 4, c. 76, Sched. (A.), is imposed on “any paper containing public news, intelligence, or occurrences, printed in any part of the United Kingdom, to be dispersed and made public.” This is a repetition of the definition of a newspaper contained in the statute first imposing a duty—10 Ann. c. 19, s. 101, in the subsequent Acts increasing the duties, and in the Acts 44 Geo. 3, c. 98, and 55 Geo. 3, c. 185, for consolidating the stamp duties. If this provision had stood alone in the 6 & 7 Will. 4, c. 76, Sched. (A.), there would have been no doubt that the publication in question was a newspaper. The statute does not enact that, if it contain public news, intelligence, or occurrences, *alone or exclusively* of other matter, it shall be deemed a newspaper; if it had, it is obvious that the enactment

news or any news, for the reasons before given, and by which, therefore, I think is to be understood a paper whose main or general object is to give to the public information as to recent events. Upon referring to the paper in question, a printed copy of which is annexed to the case, I have no doubt that it would fall within this definition of a newspaper. But it is contended that the subsequent enactment controls and limits the previous definition, and that nothing is a newspaper under the statute except that which answers both definitions. The subsequent clause is as follows:—"And also" (words clearly cumulative, not restrictive,) "any paper containing *any* public news, intelligence, or occurrences, or *any* remarks or observations thereon, printed in any part of the United Kingdom *for sale*, and published periodically, or in parts or numbers, at intervals not exceeding *twenty-six days* between the publication of any two such papers, parts, or numbers, *where any of the said* papers, parts, or numbers respectively *shall not exceed two sheets* of the dimensions hereinafter specified (exclusive of any cover or blank leaf, or any other leaf upon which any advertisement or other notice shall be printed); *or shall be published for sale for a less sum* than sixpence, exclusive of the duty by this Act imposed thereon." This clause is taken with some alterations from the 60 Geo. 3 & 1 Geo. 4, c. 9, which is avowedly for the purpose of restraining the publication of papers upon political subjects, published in great numbers and at small prices, and therefore makes them liable to the stamp duties, which they were not before. It provides that "from and after ten days after the passing of this Act, all *pamphlets* and papers containing *any* public news, intelligence, or occurrences, or any remarks or observations thereon, or upon any matter in Church or State, printed in any part of the United Kingdom for sale, *and published periodically*, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such pamphlets or papers, parts or numbers, where

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any of the said pamphlets or papers, parts or numbers respectively shall not exceed two sheets, or shall be published for sale for a less sum than sixpence, exclusive of the duty by this Act imposed thereon, shall be deemed and taken to be newspapers within the true intent and meaning" of the stat. 38 Geo. 3, c. 78, and other statutes, including the 55 Geo. 3, c. 185. I cannot suppose that an enactment clearly meant to extend the limits of taxation, could be introduced into this Act, the 6 & 7 Will. 4, for the purpose of narrowing them, especially after another clause which extends the tax to papers containing only or principally advertisements; nor does the language used bear that construction. The words used are, "and *also* any paper, &c." A newspaper is, therefore, not merely a paper containing public news, &c., printed to be *dispersed and made public*, that is, not merely a paper whose main or general object is to give intelligence of recent events, to be dispersed and made public; but any paper containing either *any* public news, intelligence, or occurrences, or *any* remarks or observations thereon, printed for sale, though its main or general object may not be to give intelligence of recent events, and though it may not be to be *dispersed and made public* after the usual manner of newspapers, or within the meaning of those terms, provided it be published periodically or in numbers, at intervals not

tains *any* news, intelligence, or occurrences, *or* any remarks or observations thereon, though its chief object be not the giving of news of recent events to the public, or any remarks on such news, if it is printed for sale and published *in any way*, and provided such publication is at intervals of twenty-six days or less, and if each paper is two sheets or less, or if each paper is published for sale at less than sixpence, and though such publication may possibly not be construed to be a dispersion and making public in the way that a paper is, whose main object is to give public news. The publication in question is not within the last clause, because it is published at greater intervals than twenty-six days; but it is within the first, because its general object is to give the public intelligence of recent occurrences, and is therefore liable to the duty.

But it is said that the term "news" is indefinite, and that the legislature could not have intended to leave this term undefined; and that the most reasonable construction of the last clause is, that the legislature intended to define it by providing that nothing should be deemed *news* that was contained in a paper published in numbers at greater intervals than twenty-six days. I cannot think that the legislature, if they had any intention to define the term "news," would not have adopted clear language to effect that purpose, and would not have fixed the time after which events were not to answer the description of news: for instance, all events that have occurred more than twenty-six days ago. There is not a word to indicate any such intention in this clause; and it cannot be supposed that they meant to adopt a definition which would make the same event or occurrence a matter of recent occurrence or news if narrated in a daily or weekly paper, but not if contained in a monthly paper published the same day, or the day after the occurrence. They certainly have not fixed *any period* after which events should cease to be deemed news, and probably they thought it unnecessary that they should do so. Most likely the experiment would never be

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tried of publishing a paper whose general object should be to give a narrative of facts which had all occurred more than a given period, say a month, before.

POLLOCK, C. B.—This is an information for penalties and for duty under the 6 & 7 Will. 4, c. 76: and the question is, whether the publication called “The Household Narrative of Current Events,” a copy of which is appended to the case before us, is a newspaper within the meaning of the Act, and liable to be stamped as such. If it be, the defendants are liable to penalties for having issued it without a stamp, and the Crown is entitled to our judgment; if it be not, then the defendants are entitled to our judgment. The question is not free from doubt, and I say so especially after hearing the judgment of my Brother *Parks*; but neither the arguments of the counsel for the Crown, nor the judgment of my learned Brother, have satisfied me that this publication is liable to be stamped as a newspaper; and consequently our judgment (in my opinion) ought to be for the defendants.

The material part of the statute is that portion of Schedule (A.) (there is, however, no other schedule) which contains a definition of newspapers. It says, the following shall be deemed and taken to be newspapers chargeable with the said duties:—1. “Any paper containing public news, intelli-


“*reduce*” the duties on newspapers; and its preamble recites that it is expedient to “reduce” them. It must therefore be taken that no *new* duty was imposed; and if therefore this publication “The Household Narrative” would not have been liable to a stamp duty before the 6 & 7 Will. 4, it is not so now. Now the 60 Geo. 3 & 1 Geo. 4, c. 9, (passed in 1819), intituled “An Act to subject *certain* Publications to the Duties of Stamps upon Newspapers,” by the 1st section enacts, that “all pamphlets and papers, containing any public news, intelligence, or occurrences, or any remarks or observations thereon, or upon any matter in Church or State, printed in any part of the United Kingdom for sale, and published periodically or in parts or numbers, at intervals *not exceeding twenty-six days* between the publication of any two such pamphlets or papers, parts or numbers,” (the size is then alluded to) “not exceeding two sheets,” and (the price) “for a less sum than sixpence, exclusive of duty,” shall be deemed and taken to be newspapers within the meaning of the 38 Geo. 3, c. 78, and other statutes imposing duties upon and regulating the publication of newspapers;—and in the 4th section it notices “*pamphlets and papers* containing any public news, intelligence, or occurrences, or any such remarks or observations as aforesaid, printed for sale, and published periodically or in parts or numbers, at intervals exceeding twenty-six days” between two numbers—not exceeding two sheets, at a less price than sixpence—and it does not make them liable to stamp duty, but enacts that they shall be published on the first day of every calendar month, or within two days before or after. It appears to me that this is a legislative recognition that a paper published at greater intervals than twenty-six days has not the character of a newspaper, though it may be a chronicle of events, bringing up its narrative to a very recent period; and I think, as “The Household Narrative” is published at intervals exceeding twenty-six days, it would be difficult, with that statute before us, to say it was

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liable to duty under that Act. If it was not, then, for the reasons already given, it is not now.

A reference to some other publications may illustrate this. If Mr. Macaulay were to-morrow to publish a continuation of his history up to last Saturday, its news would be as recent as that of any of the Sunday papers; but in the opinion of every one it would not require a stamp. So the Annual Registers, if published in the first week of the new year, are not in the nature of newspapers, and do not require a stamp. Some of the monthly magazines have been purely literary—at least many of their numbers are so—but several of them contain regular monthly statements of births, marriages, and deaths, bankruptcies, commercial intelligence, and the proceedings of both houses of parliament while they sit, yet they are notoriously unstamped, and no claim (that I am aware of) has ever been made upon them for the payment of duty, or of penalties for its non-payment. I do not see in any of the statutes any distinction between a publication chiefly or wholly consisting of intelligence, and one containing such intelligence mixed with other matter; nor do I find anything about the main object of a publication; and I cannot, from the distinction between the two expressions, “containing news” and “containing *any* news,” come to the conclusion at which my Brother *Parke* has arrived.



turns on the distinction between news and history, which I think has been settled by the legislature.

For these reasons I therefore agree with my Brothers *Platt* and *Martin*, that our judgment must be for the defendants.

Judgment for the defendants.

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ROBINSON, Appellant, LAWRENCE, Respondent.

Dec. 1.

THIS was an appeal by the defendant from the County Court of Hertfordshire.—The case stated that the plaintiff levied a plaint, and issued a summons for 50*l.* for money had and received, abandoning the excess of his claim above that amount. The defendant gave notice of a set off equivalent to the plaintiff's claim. The Judge having heard the evidence on both sides, after some deliberation, intimated that in his opinion the defendant had established his plea of set off, but gave the plaintiff the option of being nonsuited. To this the defendant objected; but, with the leave of the Judge, a nonsuit was entered.

The Judge of a county court has power to nonsuit the plaintiff in all cases in which the Judge of a superior Court can do so.

In an appeal from the county court, as a general rule, the successful party is entitled to costs.

In last Trinity Vacation (July 10)

Lush argued for the appellant.—Under the circumstances of the case, the Judge had no power to nonsuit the plaintiff. Formerly, by the rule of the common law, a plaintiff might have withdrawn from the cause at any stage of the proceedings; and before the 2 Hen. 4, c. 7, he might have done so even after verdict. But the practice and proceedings of the county courts being regulated by statute, the power of the judge to direct a nonsuit is confined to those cases for which the statute expressly provides. If the judge had power, independently of the statutes, to direct a nonsuit in those cases in which a Judge of a superior Court has such power, the enactments would be unnecessary. The inference therefore is, that a

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nonsuit can only be entered in those cases expressly allowed by the County Court Acts. The intention of the legislature in passing these enactments was, to give a summary and final remedy to the suitor. The present case does not fall within either the 79th or the 89th sects. of the 9 & 10 Vict. c. 95 (a), which give the judge a power of nonsuiting. The 10th sect. of the 13 & 14 Vict. c. 61, which empowers the judge to award the defendant costs in case the plaintiff does not appear, affords an argument that the plaintiff cannot withdraw from the cause. In *Webster v. Mason* (b), *Coleridge, J.*, expressed a doubt whether the judge of a Court of Requests had power to direct a nonsuit.

[No counsel appeared for the respondent.]

Cur adv. vult.

PARKE, B., now said—This case was argued before my Brother *Martin* and myself at the Sittings after last Trinity Term. The question was, whether or not the plaintiff in an action for money had and received, in which there was a plea of set-off, after the judge had taken time to consider, and before the judge had delivered his verdict, could be nonsuited: and whether the judge had power to direct a

(a) Section 79 enacts: "That if, upon the day of the return of any summons, or at any con- ant, by way of costs and satisfaction for his trouble and attendance, such sum as the Judge

nonsuit, according to the Acts of Parliament which regulate the county courts. At common law, whenever the plaintiff ought to appear in Court, he was at liberty to withdraw: Co. Litt. 138. b., 139. a. In the present case, when the judge was about to deliver his opinion, and indeed by the permission of the judge, the plaintiff withdrew. We have looked through the County Court Acts, but do not find any clause contained in them that prohibits the plaintiff from exercising this common law right. We therefore think that in this case the plaintiff was at liberty to be nonsuited, and that the judge was right in permitting him to be nonsuited.

We have also taken the point with respect to the costs of the appeal into our consideration, and have consulted some of the members of this Court and other Judges, and the opinion of all of them is, that in these cases the costs of the appeal ought to follow the result; if the appellant succeeds, he ought to have the costs; if the respondent succeeds, he ought to have the costs. If the appellant is not to have the costs when the judge is wrong, the effect would be a denial of justice: in a county court, the costs are often much more important in amount than the debt itself. In this case, we are of opinion that the respondent is entitled to costs.

Appeal dismissed, with costs (a).

(a) HUNT *v.* WRAY.

THIS was an appeal from a county court, which was argued in last Trinity Vacation (July 10). This Court expressed an opinion in favour of the appellant, but took time to consult the Judges of the other Courts, in order that a general rule might be adopted as to the costs of appeal.

PARKE, B., in the present Vacation (Dec. 1), said—We have consulted the Judges of the other Courts, and they are all of opinion that the costs of the appeal ought to follow the event. It was so decided by this Court in the case of *Robinson v. Lawrence*; and indeed, if the appellant did not have his costs when the judge was wrong, there would be a manifest failure of justice.

Appeal affirmed, with costs.

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Dec. 2. **THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY v.
THE EAST LANCASHIRE RAILWAY COMPANY.**

By an agreement made between "The Manchester, Bolton, and Bury Railway Company," and "The Bury and Rossendale Railway Company," it was agreed: "first, that they would mutually concur, at the expense of the Bury and Rossendale Company, in obtain-

DEBT for tolls and duties, payable from the defendants to the plaintiffs in respect of the passage and conveyance of divers steam engines, trucks, carriages, and wagons of the defendants, and of divers persons, goods, chattels, and merchandise, along a certain railway of the plaintiffs. The defendants paid a certain sum into court in satisfaction of a portion of the plaintiffs' demand; and pleaded, as to the residue, never indebted, and payment. The cause came on for trial before *Wightman J.*, at the Liverpool Summer Assizes, 1849, when a special verdict was taken, which found the following facts:—

ing an Act of Parliament for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall: secondly, that the Bury and Rossendale Railway Company should have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it should be referred in the usual way, should determine: thirdly, that the traffic of the Manchester, Bury, and Rossendale Company, whether of passengers, merchandise, or coal, (that is, traffic using both lines or any portions thereof,) between Salford and Rawtenstall, or any points intermediate to these, should be carried on, as respects engine-power and carriages, clerks and porters, and all other expenses (except the maintenance of the Manchester and Bolton Railway), at the costs and charge of the Bury and Rossendale Railway Company, who should pay to the Manchester and Bolton Railway Company, for the use of their railway, and in respect to the traffic therein specified, a pro rata proportion (according to the distance passed over the two lines respectively) of all and singular the gross rates, tolls, and proceeds arising from the said traffic: with this proviso, that nothing therein contained nor elsewhere provided, should authorise the Manchester and Bolton Railway Company to receive, for the use of their railway between the point of junction of it with the

By the 6 & 7 Will. 4, c. cxi., for making a railway from Manchester to Leeds, certain persons were incorporated by the name of "The Manchester and Leeds Railway Company;" which Act was altered and amended by divers subsequent Acts; and by the 10 & 11 Vict. c. clxiii., the name of the Company was changed to that of "The Lancashire and Yorkshire Railway Company," the plaintiffs in this action. By the 7 & 8 Vict. c. lx., for making a railway from the Manchester and Bolton Railway, in the parish of Eccles, to the parish of Whalley, all in the county palatine of Lancaster, certain persons were incorporated by the name of "The Manchester, Bury, and Rossendale Railway Company;" which name was by the 9 & 10 Vict. c. ci., changed to "The East Lancashire Railway Company," the now defendants. By the 1 & 2 Will. 4, c. lx., intituled "An Act to enable the Company of Proprietors of the Canal Navigation from Manchester to Bolton and to Bury to make a Railway from Manchester to Bolton and to Bury, in the County Palatine of Lancaster, upon or near the Line of that Canal Navigation, and to make a collateral Branch to communicate therewith, afterwards known and cited in Acts of Parliament by the short title of 'The Manchester, Bolton, and Bury Canal and Railway Act, 1831,'" certain persons were incorporated by the name of "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway;" and were thereby authorised (inter alia) to make a railway or railways, with proper works and conveniences connected therewith, for the passage of wagons and other carriages properly constructed, commencing from the river Irwell, in the township of Salford, in the county aforesaid, and extending and passing through Clifton and other places in the said county, and terminating in the town of Bolton in that county; and were thereby authorised to receive certain rates, tolls, and duties for and in respect of passen-

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gers and goods passing over the last-mentioned railway or any part thereof, and, in case of refusal or neglect of payment thereof, to sue for and recover the same by an action of debt in any of her Majesty's Courts of record. This statute was amended by the statute 2 Will. 4, intituled "An Act to enable the Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway to alter some Parts of the said Canal Navigation, to alter and amend the Line of the said Railway, to make further collateral Branches thereto, and for amending the Powers and Provisions of the Act relating to the said Canal and Railway," and also by two other Acts, passed in the 5 Will. 4 and 1 Vict. respectively. The railway thus authorised to be constructed from the river Irwell through Clifton to Bolton, with divers works connected therewith, was accordingly constructed by the Company so incorporated by the name of "The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway;" and which last-mentioned railway was commonly called and known and mentioned in divers Acts of Parliament by the name of "The Manchester and Bolton Railway;" and amongst other works so authorised was constructed a station at the commencement of that railway near the river Irwell, in the township of Salford, near Manchester, and also certain warehouses, buildings, and conveniences con-

pany," and subsequently by the name of "The East Lancashire Railway Company," and which memorandum or agreement was duly signed by him on their behalf.

"Memorandum of Agreement.—It is hereby mutually agreed between the parties undersigned, for themselves, and on behalf of the Company of proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, and the Bury and Rossendale Railway Company:

"First, that they will mutually concur, co-operate, and aid, at the expense of the Bury and Rossendale Company, in obtaining an Act of Parliament in the ensuing session for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall.

"Secondly, that the Bury and Rossendale Railway Company shall have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it shall be referred in the usual way, shall determine.

"Thirdly, that the traffic of the Manchester, Bury, and Rossendale Company, whether of passengers, merchandise, or coal, (that is, traffic using both lines or any portions thereof), between Salford and Rawtenstall, or any points intermediate to these, shall be carried on, as it respects engine power and carriages, clerks, porters, and all other expenses, (except the maintenance of the Manchester and Bolton Railway), at the costs and charge of the Bury and Rossendale Railway Company, who shall pay to the Manchester and Bolton Railway Company for the use of their railway, and in respect to the traffic herein specified, a pro ratâ proportion (according to the distance passed over the two lines respectively) of all and singular the gross rates, tolls, and proceeds arising from the said traffic, with no other deduction from the same than that hereinafter

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mentioned; and with this proviso, that nothing herein contained nor elsewhere provided shall authorise the Manchester and Bolton Railway Company to receive for the use of their railway between the point of junction of it with the Bury and Rossendale Railway and Salford, for a greater distance than half the length between such point of junction and the terminus of the Manchester and Bolton Railway in Salford; nevertheless the Manchester and Bolton Railway Company shall be entitled to charge for the use of such portion of their railway for a length of two miles, at the least.

"Fourthly, that previous to such apportionment of the gross rates, tolls, and proceeds referred to in clause 3, the Bury and Rossendale Railway Company shall be entitled to deduct so much of the passenger duty as shall be paid by them; and afterwards further to deduct from the proceeds of all such of the said traffic as shall have been conveyed in their carriages, wagons, and trucks, and by power provided at their expense, the further sum of 12½ per cent., and no more, from the proceeds arising from passenger traffic, including gentlemen's carriages, horses, and parcels, and 30 per cent., and no more, from the proceeds arising from merchandise or coal traffic, including stone.

"Fifthly, that the Manchester and Bolton Railway Company will, if required, subscribe 75,000*l.* by taking shares



agreement was afterwards ratified by a certain deed or agreement bearing date the 22nd January, 1844, and sealed with the common seal of the Company of proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway, and signed and sealed by J. Grundy on behalf of the directors of the Manchester, Bury, and Rossendale Railway Company afterwards incorporated as aforesaid.

By the said Act of the 7 & 8 Vict. c. lx., the Manchester, Bury, and Rossendale Company were authorised to make a railway, commencing by a junction with the Manchester and Bolton Railway in the township of Clifton, in the parish of Eccles, and passing through Clifton, Rossendale, and other places therein mentioned, all in the county palatine of Lancaster, and terminating in the township of Lower Booths, in the parish of Whalley, in the said county; and as soon as the junction between the railway thereby authorised to be made and the Manchester and Bolton Railway at Clifton should be effected, and the railway opened to passenger traffic to Bury, the Company should at all times be entitled to use so much of the Manchester and Bolton Railway as lies between the point of junction and the present terminus of the same railway in Salford, with their own engines, coaches, wagons, and other carriages for the conveyance by them of all such passengers, cattle, goods, wares, merchandise, articles, matters, and things of every description, and of such only as should have first bonâ fide passed the railway thereby authorised to be made from, or should afterwards bonâ fide pass along the last-mentioned railway to, any of the usual and accustomed stations or stopping-places therein; subject only to the payment by way of toll to the said Company of proprietors of such charges, &c., as might have been or hereafter might be determined by mutual agreement between the two Companies; and also, for the purposes of such traffic only, to use the station at Salford and the conveniences connected therewith, but not so as to impede the traffic of

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the said Company of proprietors; and all the powers and remedies for the recovery of tolls, rates, and duties under the existing Acts of the said Company of proprietors, should be applicable to the recovery from the Company thereby incorporated of payments due in respect of the above traffic.

The verdict then set out some other parts of that statute; and found as a fact that the length of the Manchester and Bolton Railway from the commencement thereof from the river Irwell near Manchester, that is, at the station at Salford, to the point where the said junction is made therewith by the Manchester, Bury, and Rossendale Railway at Clifton, is four miles and no more; and that the entire length of that which was the Manchester, Bury, and Rossendale Railway is fourteen miles and no more; and that the length of so much thereof as extends from the junction at Clifton to Bury is six miles and no more.

By the 8 & 9 Vict. c. xxxv., certain persons were incorporated by the name of "The Blackburn, Burnley, Accrington, and Colne Extension Railway Company;" and were thereby authorised to make and construct a railway and works connected therewith, commencing by a junction with the Manchester, Bury, and Rossendale Railway, in the township of Tottington Higher End, in the parish of Bury, and passing through divers places therein mentioned to

might be mutually agreed upon; and the Manchester, Bury, and Rossendale Railway Company were also empowered, if they should think fit, to purchase the undertaking thereby authorised; and the Company thereby incorporated were authorised to sell the undertaking, either before or after completion, upon such terms as should be mutually agreed upon, and to convey the same to the Manchester, Bury, and Rossendale Railway Company; and that upon such conveyance being made, the undertaking should become and form part of the undertaking of the Manchester, Bury, and Rossendale Railway; and the said undertakings, when so united, should be called "The East Lancashire Railway;" and all the rights, privileges, and authorities of the Company incorporated thereby should thereupon vest in the Manchester, Bury, and Rossendale Railway Company. The Manchester, Bury, and Rossendale Railway Company having become, and being now called, the East Lancashire Railway Company by virtue of the 8 & 9 Vict. c. ci., by indenture of the 4th of August, 1845, between the Blackburn, Burnley, Accrington, and Colne Extension Railway Company and the East Lancashire Railway Company, and sealed with their common seals, the undertaking and works of the Blackburn, Burnley, Accrington, and Colne Extension Railway Company, were duly conveyed to and became vested in the East Lancashire Railway Company, according to the provisions of the statute.

By agreement under seal of the 19th of March, 1846, between the Manchester, Bolton, and Bury Canal Navigation and Railway Company of the first part, the Manchester and Leeds Railway Company of the second part, and the East Lancashire Railway Company of the third part, it was provided (*inter alia*) that the agreement of the 22nd of January, 1844, and the provisions of the statute affecting the Bolton Company, should be confirmed by an Amalgamation Act of Parliament to be obtained if possible;

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subject to this alteration, that the East Lancashire Com-
 pany, in respect of their traffic passing from the Manches-
 ter and Bolton line to the Victoria station or elsewhere,
 should be liable to pay to the Bolton or amalgamated
 Company, for the use of the Manchester and Bolton line
 between Clifton and Salford, the same sums only by way
 of toll as were set forth in the agreement of the 22nd of
 January, 1844. The Victoria station here mentioned is a
 station partly belonging to the Manchester and Leeds Rail-
 way Company, now called the Lancashire and Yorkshire
 Railway Company, and partly to the London and North
 Western Railway Company, and is connected with the sta-
 tion of the Manchester and Bolton Railway at Salford by
 a short Railway Branch, of the length of 1290 yards, being
 part of one of the lines of railway of the London and North
 Western Railway Company; by means of which passengers
 and goods passing on the Manchester and Bolton Railway
 may be forwarded to the Victoria station, and from thence
 by other lines of railway belonging to the Manchester and
 Leeds Railway Company; and passengers and goods coming
 from such other lines of railway may be forwarded to and
 along the Manchester and Bolton Railway, which became
 vested in the Manchester and Leeds Railway Company.

By the 9 & 10 Vict. c. ccclxxviii., the Manchester, Bolton,
 and Bury Canal Navigation and Railway and all its real

statute likewise confirmed the agreements of the 22nd of January, 1844, and the 19th of March, 1846, unless where inconsistent with its provisions; and enacted that all the powers, authorities, rights, privileges, provisions, directions, matters, and things applicable to the Manchester, Bolton, and Bury Canal Navigation and Railway, and contained in any Acts relating to the East Lancashire Railway Company, save only as altered by itself, should be exercised by and be applicable to the Manchester and Leeds Railway Company; provided that nothing contained in that Act should prejudice &c., any of the rights, &c., vested in the East Lancashire Railway Company by virtue of the last-named Acts of Parliament, relating to the use of the Manchester, Bolton, and Bury Railway, and the stations, warehouses, buildings, and conveniences connected therewith.

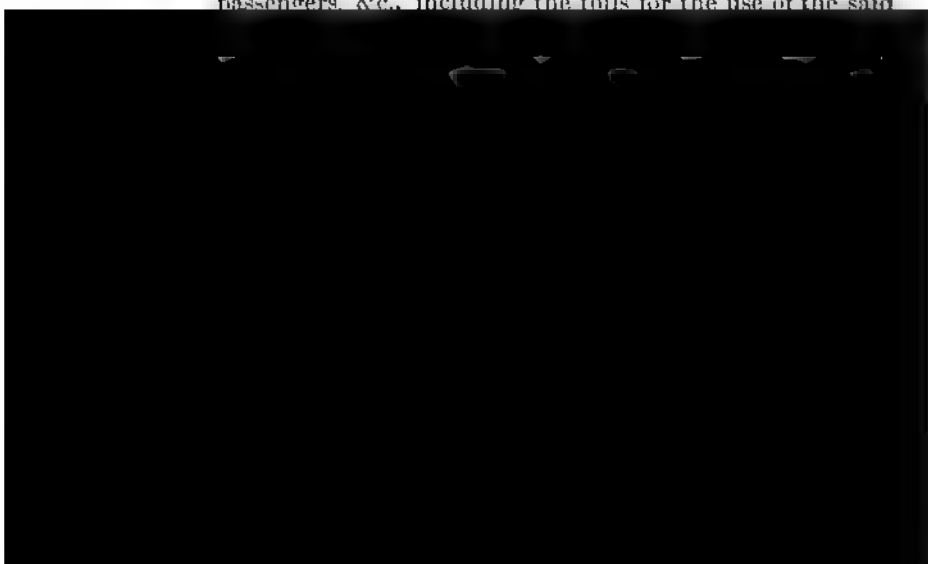
By the 7 & 8 Vict. c. xxxiv., certain persons were incorporated by the name of "The Blackburn and Preston Railway Company," for the purpose of making a railway from Blackburn, in Lancashire, and terminating by a junction with the North Union Railways; and by the 8 & 9 Vict. c. ciii., certain alterations were allowed to be made in that line; and by the 9 & 10 Vict. c. cclxvi., the Company were empowered to make certain branch railways. By the 9 & 10 Vict. c. ccclii., the Blackburn and Preston Railway Company was consolidated with the East Lancashire Railway Company; with the proviso, that the tolls, rates, and charges to be taken by the Company in respect of the passage and conveyance respectively of all goods, articles, matters, and things upon the said railway and the Manchester and Bolton Railway, between its point of junction at Clifton and its then present terminus at Salford, should be computed at such rates as if the railways thereby amalgamated, and the Manchester and Bolton Railway, formed one line of railway. By "The Liverpool, Ormskirk, and Preston Railway Act, 1846," (9 & 10 Vict. c. cclxi.), certain persons were incorporated by the name of "The Liver-

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pool, Ormskirk, and Preston Railway Company;" and were authorised to construct certain railways therein mentioned, and particularly a certain railway from a place near Liverpool to a place near Preston, and to connect the same with the Blackburn and Preston Railway, and were authorised to demise or lease their undertaking to the East Lancashire Company, or to sell and convey it to them; and it was accordingly so conveyed by indenture of the 5th of October, 1846. By the 10 & 11 Vict. c. cclxxxix., the East Lancashire Railway Company were empowered to extend their railway into Preston.

By the 9 & 10 Vict. c. cccxc., certain persons were incorporated by the name of "The West Riding Union Railways Company," and authorised to make certain railways communicating with the Manchester and Leeds Railway, and to receive for the use thereof certain rates, tolls, and charges for the passage of passengers and goods over and upon the said railways, with a proviso, that with respect to the passing of the same over the said railways for a less distance than six miles, the Company might demand tolls for six miles; and that from and after the undertaking thereby authorised should have been united to and amalgamated with the Manchester and Leeds Railway Company, the maximum rates of charge for the conveyance of passengers &c., including the tolls for the use of the said



of any Act or Acts passed during the then present session of Parliament, be amalgamated with or united to the Manchester and Leeds Railway, than the maximum rate allowed by the respective Acts severally applicable to such railway, previous to such amalgamation; and by the last-mentioned Act, the West Riding Union Railways Company, thereby incorporated, was thereby united to and incorporated with the Manchester and Leeds Railway Company, afterwards and now called "The Lancashire and Yorkshire Railway Company," in pursuance of the 10 & 11 Vict. c. clxiii.

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The special verdict then proceeded to find that the Manchester, Bury, and Rossendale Railway Company until its change of name, and subsequently as the East Lancashire Company, used so much of the railway, formerly the Manchester and Bolton Railway, as lies between the point of junction and the terminus of that railway in Salford; that between Clifton and Salford there are two other stations, the Pendleton and Windsor Bridge; and that the length of the railway of the defendants, from the commencement at the junction at Clifton to New Hall Hey Bridge, is fourteen miles; and that the entire length of the defendants' railway is seventy-two miles: and that between the 29th April and the 1st June, 1849, divers steam-engines, trucks, carriages, and wagons of the defendants, with passengers, goods, chattels, and merchandise, did pass over that part of the railway of the plaintiffs, formerly called the Manchester and Bolton Railway, which lies between Salford and the junction at Clifton, to and from the usual and accustomed stations or stopping-places on the said railway of the defendants; and that some of such steam-engines, &c. came from, and other part thereof passed on to, stations and places on that part of the railway of the defendants which lies beyond the line of that portion of the defendants' railway which was formerly called the Manchester, Bury, and Rossendale Railway; that such passing as afore-

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said was by the sufferance and permission of the plaintiffs; and that payment of the tolls and duties claimed by the plaintiffs in this action was duly claimed on their behalf.

Tomlinson (J. Henderson with him) argued for the plaintiffs in Michaelmas Term (Nov. 14).—The special verdict raises two questions: first, as to the rate of charge for carriages and passengers traversing the whole or any part of the plaintiffs' line between the point of its junction at Clifton with the defendants' line and the Salford station, which distance is found to be four miles: secondly, whether the agreement extends to traffic beyond the original Manchester, Bury, and Rossendale line. Both questions depend upon the construction of the agreement of the 14th November, 1843. With respect to the first question, the plaintiffs are by that agreement entitled to charge "a pro rata proportion, according to the distance passed over the two lines respectively." The word "distance" there means the actual distance traversed on the defendants' line, and the conventional distance, that is the two miles, on the plaintiffs' line; so that they have a right to charge that proportion of the whole amount received by the defendants for toll which the two miles bear to the whole distance traversed on the defendants' line. Thus, assuming that

station at Salford for such purposes only. The 253rd, 254th, and 255th sections of that statute also support the construction contended for. [He then referred to the 8 & 9 Vict. c. xxxv. ss. 15, 38, 40, 42; 8 & 9 Vict. c. ci. s. 6; 7 & 8 Vict. c. lx. ss. 252, 253, 254, 255, 256; 9 & 10 Vict. c. cccii. s. 27; 9 & 10 Vict. c. ccclxxviii. ss. 12, 13, 41; 9 & 10 Vict. c. cccxc. s. 26; 10 & 11 Vict. c. cclxxxix. s. 39; and argued that the effect of these enactments was to extend the benefit of the contract to the new Companies, but not to alter or extend the contract itself.]

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Hugh Hill for the defendants argued, first, that the expression “pro ratâ” in the agreement meant “mileage,” and that the toll was to be charged for the proportion which the distance of two miles bears to the actual aggregate distance traversed on both lines.—Secondly, he referred to the above enactments, and argued that they extended the agreement to the traffic throughout the whole of the defendants’ lines.

Tomlinson replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—The questions raised upon the argument of the special verdict in this case were two: first, as to the construction of a certain agreement of the 14th November, 1843; made between “The Company of Proprietors of the Manchester, Bolton, and Bury Canal Navigation and Railway,” and “The Bury and Rossendale Railway Company;” and secondly, whether this agreement extends beyond the traffic along the Bury and Rossendale Railway alone, to the traffic along the whole railway of the present defendants. The agreement was as follows:—[His Lordship read the agreement.]

At the time of this agreement, the contracting parties

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were, as is mentioned therein, "The Manchester, Bolton, and Bury Canal Navigation and Railway Company," and "The Bury and Rossendale Railway Company." The former of these Companies was afterwards, by 9 & 10 Vict. c. cclxxviii. incorporated with the Manchester and Leeds Railway Company, and ultimately became "The Lancashire and Yorkshire Railway Company," the present plaintiffs. The latter Company became "The Manchester, Bury, and Rossendale Company," and was extended to Blackburn, Burnley, Accrington, and Colne, and then became "The East Lancashire Railway Company;" and by divers subsequent Acts of Parliament certain other railways were incorporated with it; viz. the Blackburn and Preston Railway, and the Liverpool, Ormskirk, and Preston Railway, so as to form an extensive line of railways altogether.

The question raised by the special verdict is, first, what is the proper rate of charge for carriages and passengers traversing the whole or any part of the space between the point of junction and the Salford station, which is found by special verdict to be of the length of four miles, and no more? As to the rate of charges for passing these four miles between Clifton and Salford, Mr. Tomlinson for the plaintiffs contended, that the plaintiffs were entitled to charge that proportion of the whole amount received as tolls which the whole distance, viz. two miles, to be charged

the proportion of two miles to the whole distance travelled, or 2*d.*: and this latter we hold to be the true construction.

The defendants are to pay the plaintiffs a pro ratâ proportion according to the distance travelled over each railway, but the plaintiffs are not to receive for the use of their railway for a greater distance than half the length between the point of junction and the terminus, nor for a less distance than two miles. Now, as it turns out that the whole distance is four miles, the limits as to the maximum and minimum charge coincide; the rate per mile therefore for the charge is first to be settled by the relative distances actually travelled on each; and when so settled a distance of two miles is to be paid for at that rate. This is the plain and literal construction of the agreement, and we think the true one.

Then we arrive at the second question, to what railway does the agreement extend? It appears quite clear, that at the time when the agreement was made the question admitted of no reasonable doubt. The traffic of the Manchester, Bury, and Rossendale line could alone have been then contemplated, for there was no other; and the nature of the agreement itself strongly tends to shew that it must have been so limited, for it was an agreement to give accommodation at the Salford station to the traffic of the projected railway. Now that accommodation is of necessity limited by the station itself. It is one thing to accommodate traffic arising on a railway of fourteen miles, and quite another thing to do the same for a more extended, and indeed, as here contended for, an indefinitely extended, railway. Unless, therefore, we find an express extension of this agreement to the traffic of the present railways, we ought not to hold it as so extended. It is clear to us that the accommodation given must have been limited, and unless we stop at the railway existing we can find no limit whatever.

Now, looking to the different Acts of Parliament where-

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by the original Manchester, Bury, and Rossendale Railway has been extended and incorporated with others, till at length it has become the aggregate now called "The East Lancashire Railway," we do not find provisions extending and at the same time limiting this accommodation. We think that these provisions amount to no more than this, that the agreement has been made applicable to those other railways, although they were not parties who made the original contract, but that, in its terms, it remains as limited as before. They are entitled to all its provisions and benefits, quite as much as if they had been the original contracting parties to it. But the contract itself remains as before. If they wish the traffic beginning on these lines, and passing over the original Manchester, Bury, and Rossendale Railway, and from it over the Railway extending from the point of junction to the Salford station, or over any part thereof, to pass at the rates provided for by this agreement, they cannot do so without a fresh and additional agreement to that effect. It is a very different thing to say, that any traffic coming by coach or wagon or on foot to the original Railway was contemplated, for that of necessity has the limit arising out of the very nature of such a mode of access; but the extension of the Railway itself would, we think, clearly not be within the original agreement, for such additional traffic is really quite un-

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COVENANT.—The declaration stated that, by an indenture dated the 23rd September, 1830, and referred to in the recitals of the indenture next hereinafter mentioned, then made between the plaintiff as sole executor of William Cottee of the one part, and Daniel Allen of the other part, the plaintiff, in consideration of the sum of 530*l.*, to be paid by D. Allen to the plaintiff, did demise and lease unto D. Allen, his executors, administrators, and assigns, all that messuage or tenement, therein described, partly leased to Francis Taylor and in the occupation of certain persons, together with the right of way and free egress and regress to the said premises: To have and to hold the said messuage and premises, with the appurtenances, subject to the said lease to F. Taylor of part thereof, unto the said D. Allen, his executors, &c., from the 25th of September then instant, for the term of fifty-five years, at the yearly rent of 84*l.* [The declaration then stated that D. Allen covenanted with the plaintiff to pay him as such executor, during the continuance of the term, the rent of 84*l.*, and also to repair the premises.] That afterwards, on the 7th of July, 1832, by another indenture then made between the plaintiff of the one part, and the defendant of the other part, after reciting the lease of the 23rd of September, 1830, and that the 530*l.* was not paid, but that the plaintiff had agreed to take with other security a mortgage of the said leasehold premises for the same, payable as thereafter mentioned: It was witnessed that D. Allen did bargain, sell, assign, transfer, and set over unto the plaintiff, his executors, administrators, and assigns, the premises comprised in and demised by the thereinbefore in part recited inden-

The plaintiff, in consideration of 530*l.* to be paid by A., demised to him certain premises for the term of fifty-five years, at the yearly rent of 84*l.*, and subject to covenants to repair, &c. The consideration not having been paid, A. assigned to the plaintiff the residue of the term then unexpired, subject to the rent and covenants, and with a power of sale. In pursuance of that power, the plaintiff, in consideration of 500*l.*, "bargained, sold, assigned, transferred, and set over" to the defendant the said premises, to hold "for the residue of the said term of fifty-five years," subject to the yearly rent of 84*l.*, and the covenants contained in the lease to A.; and the defendant covenanted to pay the rent and perform the covenants. The defendant having entered on

the premises:—*Held*, that, although the mortgage by A. to the plaintiff operated as a merger of the term originally granted, yet the assignment by the plaintiff to the defendant created a new lease for the residue of the unexpired term, and consequently the defendant was liable on the covenants.

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ture of lease of the 23rd of September, 1830, with their appurtenances, and the right, title, and interest of the said D. Allen therein: To hold the same unto the plaintiff, his executors, &c., for all the residue then unexpired of the term of fifty-five years, created by the said thereinbefore recited indenture of lease, subject to the rents and covenants in the same indenture reserved and contained, and also subject to a proviso or agreement for redemption by the said D. Allen, his heirs, executors, &c., on payment by him or them of 530*l*., with interest at the rate of 5*l*. per cent. per annum, at a day thereinbefore mentioned and then long since past, and with the power to sell on giving three months' notice. Also reciting that D. Allen had become insolvent; that pursuant to that power notice had been given to sell, and that the plaintiff had agreed to sell to the defendant for 500*l*.: It was witnessed that, in consideration of 500*l*. to the plaintiff in hand paid, the plaintiff bargained, sold, assigned, transferred, and set over to the defendant all those tenements described in the lease: To have and to hold the premises from the 25th of June then last, for and during all the rest, residue, and remainder of the term of fifty-five years, granted by the thereinbefore recited indenture of lease of the 23rd of September, 1830, free from and absolutely discharged from the mortgage debt of 530*l*. and interest and every part thereof, and of and from all



ed or intended so to be, well and truly to pay or cause to be paid to the plaintiff the said yearly rent of 84*l.*, by the said recited indenture reserved and made payable, and to perform and fulfil and keep all the covenants, provisoes, and agreements in the said indenture contained, on the tenant's, lessee's, or assignee's part to be observed and performed.—The declaration then stated that the defendant entered upon the premises thereby assigned, and alleged as breaches (*inter alia*) the non-payment of three quarters' rent, and the non-repair of the premises.

Plea, that after the making of the indenture of the 7th July, 1832, and after the alleged assignment to the defendant, and before the committing of the breaches of covenant, to wit, on &c., by a certain indenture then made between the defendant of the one part, and E. Lawson of the other part, and sealed with their respective seals, the defendant did assign unto E. Lawson the premises mentioned and comprised in and described by the indenture of lease of the 23rd September, 1830: To have and to hold the same, with the appurtenances, to E. Lawson, his executors, &c., thenceforth for and during all the residue and remainder then to come of the said term of fifty-five years, and all other the estate, term, right, or interest (if any) of the defendant therein: Provided that the said assignment to E. Lawson should not be treated as implying that the said term was subsisting, or that the defendant had any estate or interest in the premises; whereupon E. Lawson entered into and upon the demised premises, and became and was possessed thereof for the residue of the said term.—Verification.

Special demurrer, assigning for causes (amongst others), that the plea tended to an immaterial issue, in this, that it set up the assignment as an answer, as if by such assignment the defendant was no longer liable on his express covenant.—Joinder in demurrer.

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Phipson argued in support of the demurrer (Nov. 19). —The plea is clearly bad, provided the defendant took any interest under the assignment. It is objected, however, that the declaration is bad, because it shews a merger of the term granted by the plaintiff to Allen; and consequently that the assignment to the defendant was inoperative. But a merger only takes place where two estates come to one and the same person in one and the same right: *Preston*, Conv. vol. 3, p. 273. That doctrine is indeed questioned in *Preston on Conveyancing*, vol. 3, p. 277, where it is said to be, "as a general proposition, contrary to several ancient and to some modern cases;" and the conclusion there drawn from the authorities referred to is, that a merger will take place where a party has the freehold in his own right, and the term in right of another. The subject is fully considered in a note to *Wiscot's case* (a), which established that, wherever the inheritance comes to the particular estate, whether by act of God, the law, or the party, the particular estate is merged: Vin. Abr. "Merger" (I). If the general proposition be true, that the two estates must be held by the same person in the same right, there was no merger in this case, for the first estate was held by the plaintiff in *autre droit*.

But assuming that there was a merger, the assignment operated as a re-creation of the lease as between the plain-

come into it for such a determinate time; such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose." In *Wilkinson v. Hall* (a), the plaintiff mortgaged land in fee, with a proviso for redemption on payment of the principal in June, 1833; but it was agreed that the mortgagee should not call in the principal until 1840, if interest were regularly paid in the mean time; and that the mortgagor should hold the premises, and take the rents, issues, and profits for his own use, till default should be made in the payment of principal and interest as aforesaid; and that was held to operate as a re-demise to the mortgagor till 1840. In *Shep. Touch.* p. 272, it is said, "Albeit the most usual and proper making of a lease is by the words demise, grant, and to farm let, and with an habendum for life or years; yet a lease may be made by other words, for, whatsoever word will amount to a grant, will amount to a lease." If the plaintiff was seised in fee, the assignment was a good conveyance by way of bargain and sale under the statute of uses; if he was a termor only, the assignment operated as a lease. [*Parke*, B.—You assume that the plaintiff had a chattel reversion.] The contrary is not to be presumed: in every action between lessor and lessee, the declaration merely states that the plaintiff demised to the defendant. But even though a termor demise for the whole of his term, that will not be deemed an assignment against the intention of the parties: *Pollock v. Stacy* (b). [*Parke*, B.—That is at variance with the opinion of this Court in *Barrett v. Rolph* (c). The subject is discussed in a learned note to *Spencer's case* in *Smith's Leading Cases*, vol. 1, p. 38 g.] If an owner in fee merely assigned the premises to

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(a) 3 Bing. N. C. 508. (b) 9 Q. B. 1033. (c) 14 M. & W. 348.

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another for a certain term, that would be equivalent to a lease. Before the Statute of Frauds, a mere statement "You shall have a lease of my lands in D. for twenty-one years, paying therefore 10*l*. per annum," has been held a good parol lease for twenty-one years: *Bac. Abr. "Lease" (K.)*. *Denn d. Wilkins v. Kenneys (a)* resembles the present case. There the owner in fee of certain premises demised them for a term of 999 years, and afterwards released to the lessee the reversion in fee. The lessee, by indenture, reciting the demise, did "grant, bargain, sell, assign, and set over" the premises for the residue of the term of 999 years; and Lord *Ellenborough* said, that there was a resuscitation of the term by the words "grant, bargain, and sell, as well as assign." A covenant to stand seised to uses has been held a lease: *Right d. Basset v. Thomas (b)*. Also, a covenant that one should enjoy certain premises during "a term" of years, the word "term" being construed to signify the time as well as the interest: *Wright v. Cartwright (c)*. Those authorities shew that there was a good re-creation of the term in the defendant; and consequently he is liable on the covenants.

Watson contra.—The assignment to the plaintiff by way of mortgage caused a merger of the term originally created. The defendant covenants to pay the rent reserved by the



was not under the lease, but under a distinct yearly demise. Here it is argued that the assignment to the defendant operated as a resuscitation of the lease, and if so, he has got his quid pro quo.] The indenture is not pleaded as a lease, but as an assignment. The word "grant" is not used in it; and the words "assigned and set over" shew that it was intended to operate as the transfer of an existing term, and not to create a new lease. There is no implied covenant for quiet enjoyment during the term. The stipulation is not, that the defendant shall hold for fifty-five years absolutely, but for the residue of a term of fifty-five years originally granted by another lease, and which might possibly become void by cesser or forfeiture. It is true that a mere license to enjoy a piece of land for a certain period may amount to a lease; but a covenant by a mortgagee with a mortgagor that the former will not take the profits until default of payment, or that the latter shall take the profits until default of payment, is no good lease: *Shep. Touch.* p. 272; *Doe d. Roylance v. Lightfoot* (a). The authorities collected in *Smith's Lead. Cas.*, vol. 1, p. 38 g, shew that where a termor transfers his whole interest, that operates as an assignment and not as a lease. Where indeed the apparent intention of the parties is to make an independent lease, such a construction will be put upon the words, though informal, as to effectuate that object; but where, as here, an assignment only is contemplated, there is no reason for construing the instrument as a lease. Perhaps the defendant might be responsible in another form of action, but he has not committed any breach of the covenants contained in the first lease.

Phipson in reply.—The argument founded on the language of the covenant to pay "the rent reserved by the recited indenture" is of no weight, for those words are used only by way of designation. It resembles the case where

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(a) 8 M. & W. 553.

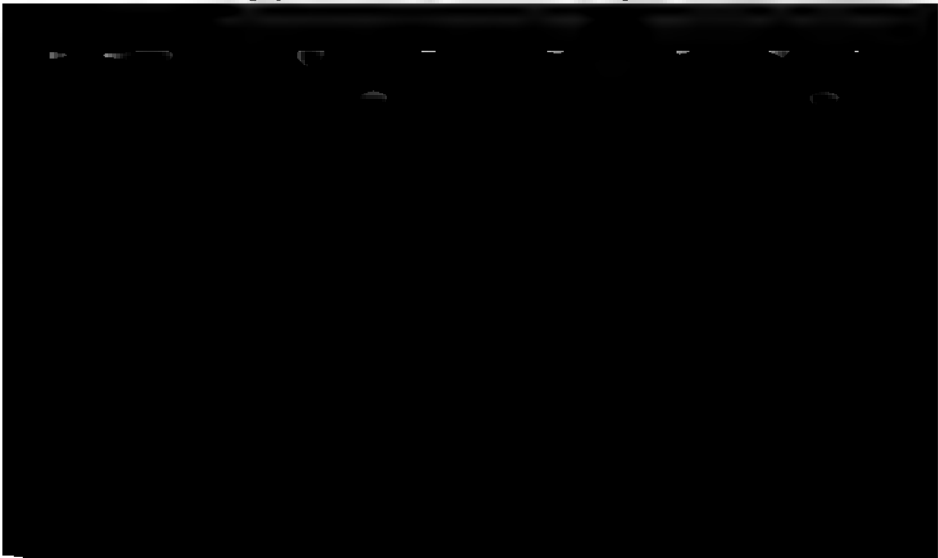
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a lease has expired by effluxion of time, and the parties make a new lease, referring to the former merely to identify the amount of rent. The word "term" means only the period during which the defendant is to hold. [*Parke, B.*—Suppose the defendant had been evicted during the term, would he have had any remedy?] The parties meant that there should be a lease without any covenant for title. *Pitman v. Woodbury* is inapplicable, because there the defendant did not enjoy the premises under the lease, and therefore was not liable on the covenants contained in it.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B., (after stating the pleadings).—On the argument of this case the plea was given up, and the question was whether the declaration was sufficient. Mr. *Phipson* for the plaintiff conceded, and properly, that on the face of the declaration the term of fifty-five years appeared to be merged, by the lessor taking an assignment of the whole term, though by way of mortgage; but he contended that the effect of the conveyance to the defendant was to create a new term of the same duration as the unexpired part of the old term, and that the defendant's covenants to pay the reserved rent, and to repair during the residue



We are very glad to find that there is ample authority to enable us, on legal grounds, to construe this instrument so as to give effect to the intention of the parties. The word "term," according to the opinion of *Anderson*, C. J., in *Green v. Edwards* (a), may be taken "not only for the interest but for the time;" and if so, the residue of the term after a particular event, may mean so many years as should be afterwards to come. And the same doctrine was laid down by Lord *Mansfield* in *Wright v. Cartwright* (b). If we construe the word "term" in this case to be the number of years unexpired, and not the interest in the tenements, we give effect to the instrument, which would otherwise be void altogether, and the money which the defendant paid for his purchase lost. In the case of *Denn d. Wilkins v. Kemeys* (c), Lord *Ellenborough* appears to have had no doubt that there was, under similar circumstances, what he termed a resuscitation of the term, and the rest of the Court seem to have acquiesced. It is apparent on the face of the deed that both parties supposed the term not to have been merged, and that they were under an error; but it is clear they both meant the defendant to enjoy the land for a certain number of years, and that intent can be carried into effect, and the defendant's covenant dependent thereupon enforced.

In the view we take of this case, it is unnecessary to consider whether the Court of Queen's Bench are right in the view they take of the *Nisi Prius* decision of *Poultney v. Holmes* (d), in the case of *Pollock v. Stacy* (e); or this Court, in that of *Barrett v. Rolph*. It is not necessary to rely on the authority of the case of *Pollock v. Stacy* (e). Therefore there will be judgment for the plaintiff.

Judgment for the plaintiff.

(a) Cro. Eliz. 216.

(b) Burr. 284.

(c) 9 East, 366.

(d) 1 Str. 405.

(e) 9 Q. B. 1033.

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**FENN and Another v. BITTLESTON and Others, Assignees
of MALPAS, a Bankrupt.**

A., by deed, dated the 28th of September, 1845, conveyed certain goods to B., subject to a proviso, that if he should pay B. the sum thereby secured on the 22nd of March, 1850, or at such earlier day or time as B. should appoint, by giving A. fourteen days notice, and should pay interest in the meantime half-yearly, the conveyance should be void; and it was thereby agreed between the parties, that, until default should be made in the payment of the principal sum secured at the time therein

TROVER for certain household goods and furniture. Pleas, not guilty and not possessed; upon which issues were joined.

At the trial, before *Pollock*, C. B., at the London Sittings after Hilary Term last, the following facts appeared:—The property in question had originally belonged to a Mrs. Clarke, who kept an hotel at Nottingham; and, upon her death, the property came to her two daughters, one of whom married a person of the name of Rhoades, and the other Malpas. On the 20th of March, 1845, an arrangement as to the division of the property was come to between the two brothers-in-law, Malpas and Rhoades, when the former, being indebted to Rhoades in a large sum, mortgaged the goods in question to him. This deed, dated the 20th of September, 1845, and made between Malpas of the one part, and Rhoades of the other part, after reciting that Malpas was indebted to Rhoades in 1678*l.* 17*s.* 7*d.*, and was unable to pay the same, in order to secure the payment thereof, witnessed that Malpas did thereby bargain, sell, and assign unto Rhoades, his executors, administrators and assigns, all the stock in trade, fixtures, goods

22nd of March, 1850, or at such earlier day or times as Rhoades or his executors, &c., should appoint for the payment thereof, by a notice in writing, to be given to Malpas or his executors, &c., fourteen days at least before such day or time, the deed should be void; and that, in the meantime, interest should be payable half-yearly on the principal sum secured and remaining unpaid. The deed then contained a covenant by Malpas to pay the principal sum and interest, according to the terms of the deed; and it was thereby declared that, after and in case of default in payment of the principal sum or any part thereof, contrary to the tenor and effect of the said proviso, and in respect of the interest, after notice requiring payment thereof, it should be lawful for Rhoades, his executors, &c., peaceably to take into his and their possession, and to hold and enjoy, all the said goods and chattels, and to sell them &c. And further, that, until default should be made in payment of the said principal sum according to the terms of the deed, or until default should be made in payment of interest on the said principal sum, after fourteen days notice requiring payment of the same, "it should be lawful for Malpas, his executors or administrators, to hold, make use of, and possess, the goods and chattels hereby assigned, or intended so to be, without any manner of hinderance or disturbance of or by him the said J. Rhoades, his executors, administrators, or assigns." In 1845, Rhoades, for a valuable consideration, conveyed the goods to the plaintiffs. In December, 1849, Malpas, who was then the landlord of the hotel in which the property was, became bankrupt; and shortly afterwards, the defendant Bittleston was appointed his official assignee, and the other defendants creditors' assignees. On the 19th of February, 1850, the goods were sold by the assignees, on the ground that they were in the reputed ownership of the bankrupt at the time of his bankruptcy. No demand had been made by Rhoades or the plaintiffs of the principal money or

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interest in the meantime from Malpas. Under these circumstances, the learned Judge directed a verdict to be found for the plaintiffs for the value of the goods, leave being reserved to the defendants to move to set that verdict aside, and to enter a verdict for them.

Knowles having obtained a rule nisi accordingly,

Hoggins and *Cowling* shewed cause (June 5, and Nov. 4).—The plaintiffs do not dispute the rule of law, that, in order to maintain this action, at the time of the conversion they must have been entitled to the possession of as well as the property in the goods: *Gordon v. Harper* (a), *Isaac v. Belcher* (b). First.—According to the true construction of the mortgage-deed, *Malpas* merely held the goods as tenant at will. In *Gordon v. Harper*, the landlord had parted with the property to his tenant for a definite time; and it was held that the action would not lie against the sheriff for an alleged conversion during the existence of the term. Now the deed here does not contain any negative words to prevent *Rhoades* from seizing the goods at a period antecedent to the 22nd of March, 1850. The concluding clause does not constitute a lease, but amounts in effect only to a covenant, by which the mortgagor holds the goods as tenant at will. If the deed

words of the instrument shew that it is the intent of the parties that the one shall divest himself of the possession, and the other come into it for a *determinate time*, the instrument is in effect a lease; and upon that principle *Wilkinson v. Hall* (a) was decided; but Lord Denman, C. J., in *Chapman v. Beecham* (b), says that *Wilkinson v. Hall* was questioned in *Doe d. Parsley v. Day*, upon the authority of the passage in Sheppard's Touchstone, which was not brought to the attention of the Court of Common Pleas. *Bradley v. Copley* (c) was much relied upon by the defendants in moving this rule; but the authority of that case upon the question, which is the same as that now before the Court, is extremely doubtful, and indeed it appears to have been scarcely argued. If, then, Malpas was a mere tenant at will under the deed, the tenancy was determined by the assignment to the plaintiffs.

Secondly.—Assuming the deed to amount to a lease, the sale by the assignees destroyed the bailment, according to the well-known rule to be found in Co. Litt. 71. a. If Malpas had *himself* sold the goods before his bankruptcy, that would have destroyed the bailment; and for this purpose, therefore, the act of the assignees is, in point of law, the act of the bankrupt. In *Gordon v. Harper* the goods were taken in execution by *the sheriff*, and it was held that the plaintiff did not thereby become entitled to the possession; but in *Cooper v. Wilломatt* (d) and *Bryant v. Wardell* (e), the bailee himself effected the sale, and it was held that the bailment was destroyed.

Knowles, Crompton, and Aspland in support of the rule.—The present action does not lie. First.—It is clear that the bankrupt did not hold the goods as tenant at will. The deed contains a positive and affirmative covenant, by

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(a) 3 Bing. N. C. 508.

(b) 3 Q. B. 730.

(c) 1 C. B. 685.

(d) 1 C. B. 672.

(e) 2 Exch. 479.

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which he is entitled to hold them for a term *certain*, defensible in the meantime. *Bradley v. Copley* (a), and *Wheeler v. Montefiore* (b), are express authorities in the defendants' favour.

Secondly.—The sale did not determine the bailment. If the bailee *destroys* the chattel, or does that which amounts to a destruction of it, the case would be different: *Bloxam v. Sanders* (c).

Thirdly.—Supposing the deed to create a tenancy at will in one sense of the words, it is not such a tenancy at will as to bring the case within the rule in *Co. Litt.*, which is to be understood of a tenancy at will in the strictest sense of the term, as for instance, such a tenancy as is created by a loan. But this tenancy could not have been determined at the will of *either* party.

Lastly.—The plaintiffs should either have brought their action against the vendee of the goods after demand, or they should have declared for an injury to their reversion: *Hall v. Pickard* (d), *Wilkinson v. King* (e), *Wilmshurst v. Bowker* (f).—They also referred to *Hutton v. Bragg* (g), *M'Carthy v. Abel* (h), *Howes v. Ball* (i), *Smith v. Sheriff of Middlesex* (k), *Newberry v. Colvin* (l), *Pain v. Whittaker* (m), *Loeschman v. Machin* (n), *Manders v. Williams* (o), *Rogers v. Grazebrook* (p), and *Youl v. Harbottle* (q).

Term, on shewing cause against a rule for setting aside a verdict for the plaintiffs and entering a nonsuit, on the ground that the plaintiffs had no right to recover the chattels, the subject of the action, in trover against the defendants, the assignees of a bankrupt of the name of Malpas.

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Malpas, and a person of the name of Rhoades, had married sisters, and were entitled, in right of their respective wives, to a distributive share of the effects of their mother, who died intestate. The bankrupt and his wife had carried on business with these effects; and on an account and division taking place between Malpas and Rhoades, the former was found indebted in 1678*l.* and upwards to the latter, and thereupon executed to him a mortgage of the goods and chattels in question in this action, on the 28th of September, 1845. By the mortgage deed, Malpas conveyed to Rhoades absolutely, subject to a proviso, that if Malpas should pay Rhoades 1678*l.* on the 22nd of March, 1850, or at such earlier day or times as Rhoades should appoint, by giving fourteen days notice to Malpas, and should pay interest in the meantime, the conveyance should be void; and it was agreed between the parties, that until default should be made in the payment of the principal sum of 1678*l.* at the time before specified, or the interest, after fourteen days notice, it should be lawful for Malpas, his executors, and administrators, to hold and enjoy the chattels. Malpas continued to keep possession of the chattels, according to the deed, till the 13th of December, 1849, when he became bankrupt; and his assignees, who were the defendants, on the 19th of February, 1850, sold the whole of them absolutely,—not merely the bankrupt's interest. No demand was made by Rhoades or the plaintiffs for the principal money or interest in the meantime from Malpas. Rhoades, after the execution of the deed, assigned the goods to the plaintiffs.

It was contended on behalf of the defendants, that, by the covenants in the deed, Rhoades gave an interest in the

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chattels, in the nature of a demise, until the 22nd of March, 1850, defeasible by a notice, according to the terms of the deed, to pay at an earlier period; consequently, that, at the time of the conversion by the sale on the 19th of February, 1850, the plaintiffs, the assignees of Rhoades, had no present right of possession, and therefore could not maintain an action of trover, on the principle laid down in *Gordon v. Harper* (a) and *Bradley v. Copley* (b).

The plaintiffs on the other hand contended, that no interest for any time passed by the deed to Malpas; but that the covenant for the enjoyment by Malpas either operated as a mere covenant, or at most as a bailment to hold at will, and if so, Rhoades might have maintained an action of trover against the defendants. We think that the effect of the agreement of the parties in this case was to give, not a mere possession and the use of the chattels to Malpas, as a bailee, but the right of possession and use for the term ending the 22nd of March, 1850, defeasible by non-payment of the principal on fourteen days notice, and non-payment of the interest in the meantime. The duration of the time of holding was not uncertain, as it would have been had it been only until such notice had been given; and in that case it might have been a term for life (which would not be so in the case of a demise of land, for want of livery of seisin). But it has a certain limit which it cannot exceed,

had no present right to the possession. The cases of *Gordon v. Harper* and *Bradley v. Copley* would certainly have applied. But the learned counsel for the plaintiffs contended, that if the bailment was for that term, *it was put an end to* by the act of the assignees (whose act for this purpose is the same as that of Malpas himself), in selling the chattels absolutely before the 22nd of March, 1850, and so preventing themselves from returning them at the end of the term, and that such sale was itself a conversion; and we are of that opinion.

There is no reported case exactly like the present. In that of *Bryant v. Wardell* (a), the chattels were bailed *for a time certain*, and trover was held to lie by the bailor, because the bailee had done what was equivalent to the destruction of the chattels, and so brought himself within the principle laid down by Lord Coke in Co. Litt. 71. a., namely, "That, if one lends oxen to another to plough his land, and he kills them, the owner may have trespass, or trespass on the case, at his election." In some cases, the bailment has not been *for a time certain*, as in *Youl v. Harbottle* (b), where a carrier was held liable in trover for a misdelivery. So in *Wilkinson v. King* (c), *Loeschman v. Machin* (d), and *Cooper v. Willomatt* (e), it would rather seem that the bailment was for a time certain, viz. in each case from week to week; no distinction, however, appears to have been made by the Court between such a bailment and one at will. But it was held, that the act of the bailee in doing a thing entirely inconsistent with the terms of the bailment, though not amounting to a destruction of the chattel, was a determination of the lawful bailment, and caused the possessory title to revert to the bailor, and entitled him to maintain an action of trover. It is true that, if it had been done by the bailee *animo furandi*, it could not have been

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(a) 2 Exch. 282.

(b) 2 Peake N. P. 49.

(c) 2 Camp. 335.

(d) 2 Stark. 300.

(e) 1 C. B. 672.

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punishable as a larceny; because, being lawfully in possession of the chattel, the taking it would not be either a trespass vi et armis or felony, unless the nature of the article had been changed, as by breaking open a bale; the reason for which distinction is somewhat subtle, but is fully explained in the Year Book, 13 Edw. 4, fol. 9 b, namely, that the possession of the article in its original state was with the consent of the bailor, and therefore lawful; but there was no consent to the possession of the article in its altered state, so that, after the alteration, the bailment was determined. But, although the delivery of the chattels to a third person in their entire state would not have been felony, that delivery, at all events, under an absolute sale, was wrongful nevertheless; for the contract between these parties never meant to authorise Malpas, his executors or administrators (not assigns) to do more than use the chattels, and not to give the use to a third person, certainly not for a longer period than his own term. The transfer of the property absolutely to a stranger was, therefore, unquestionably wrong, and it operated as a disclaimer of tenancy at common law. We are of opinion, therefore, that the plaintiffs are entitled to recover, and that the rule must be discharged.

Rule discharged.

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THARRATT v. TREVOR.

THIS was a rule calling on A. Underwood, an attorney of this Court, to shew cause why he should not pay to W. Ellaby the sum of 7*l.* 16*s.*, pursuant to his undertaking.

It appeared from the affidavits that Ellaby was the attorney of the plaintiff in an action brought by her in a county court, in which she was nonsuited. The plaintiff subsequently employed Underwood to commence an action for the same cause in this Court; and he, requiring the papers for that purpose, proposed to Ellaby that he should accept from the plaintiff 2*s.* per week in payment of his costs, and deliver up the papers upon the undertaking of Underwood to pay out of the first monies which might come to his hands in that or any other proceeding on the plaintiff's account whatever balance might remain due. Ellaby wrote to Underwood consenting to this proposal; and in answer Underwood sent him the following letter:—

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“Dear Sir,—I have advised the plaintiff to pay to you the sum of 2*s.* per week, the sum mentioned in your favour of this date, which she has agreed to do; but of any monies which I may receive on this or any other proceeding on her account, I will hand you such balance as may remain due on your bill of costs as settled at 9*l.*

“I remain, &c.

“A. UNDERWOOD.”

The papers were delivered up, and the action having proceeded, the plaintiff obtained a verdict and judgment, and Underwood received the damages and costs. Application was then made to him for payment of 7*l.* 10*s.*, which remained due to Ellaby in respect of his costs; and payment having been refused, this rule was obtained.

A., an attorney, having been employed by a former client of B., in consideration of the latter handing him over the papers in the cause, wrote as follows:—“Out of any monies which I may receive on this or any other proceeding on the plaintiff's account, I will hand you such balance as may remain due of your bill of costs, as settled at 9*l.*:—*Held*, that A. was bound to pay B. out of the first monies A. received on account of the client, and not out of the surplus after deducting his own costs.

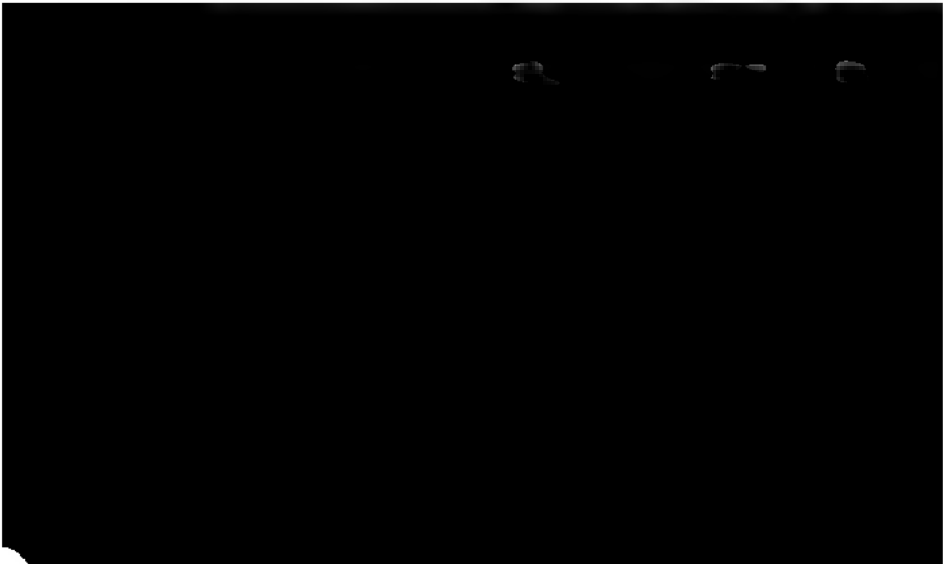
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Bramwell shewed cause (Nov. 22) and argued, that the undertaking was subject to the lien of Underwood for his costs; and that he was only bound to pay over the balance after they were satisfied.

Simon, in support of the rule, argued that it was an absolute undertaking to pay as soon as any monies of the plaintiff were received.

Cur. adv. vult.

PARKE, B., now said—In this case we took time to look into the affidavits and consider the effect of the undertaking. It was in these terms:—[His Lordship read the letter.]—In consideration of that undertaking, the papers were handed over to Mr. Underwood, who from that time conducted the suit, which is now brought to a termination, and he has received the proceeds. Mr. *Bramwell* on shewing cause set up for the first time—because that never appears to have been set up in the correspondence, nor was the objection ever made in the affidavits—that his client was only bound to pay out of the surplus after deducting his own bill as an attorney, for which he had a lien on the sum recovered; and a doubt was entertained at the time of the argument whether that was the meaning of the contract or not. We have all of us considered it, and are sa-



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Dec. 5.

THIS was a rule calling on the judge of the county court of Cornwall and J. Isaac, the plaintiff, to shew cause why a prohibition should not issue to restrain J. Isaac from proceeding in a plaint in that court.

It appeared by the affidavits, that the claim in the plaint and summons was 50*l.*, and the particulars of demand stated various items for goods supplied at different times, amounting in the whole to 50*l.* At the hearing of the cause, the plaintiff admitted on cross-examination that the sum of 98*l.* 19*s.* 2*d.* was due to him for goods supplied under the same contract. It was thereupon objected by the defendant that the Court had no jurisdiction, and that the plaintiff should have issued his plaint for 98*l.* 19*s.* 2*d.*, and have made therein a formal abandonment of the excess above 50*l.* The judge required the plaintiff to abandon the excess; and an entry was made on the particulars of demand that the 50*l.* was "in full satisfaction of 98*l.* 19*s.* 2*d.*, the overplus thereof having been abandoned." Judgment was then given for the plaintiff for 50*l.*; and an entry was made on the judgment that the 50*l.* was "in full discharge of 98*l.* 19*s.* 2*d.*, being the amount due from the defendant at the time the action was brought."

Where a plaintiff, having a cause of action to an amount exceeding 50*l.*, issues a plaint in a county court for that amount only, it is not necessary, in order to give the Court jurisdiction, that entry of the abandonment of the excess should appear on the plaint or summons; but it is sufficient if such entry be made at the hearing of the cause.

The present rule was obtained on the ground that the court had no jurisdiction, inasmuch as the abandonment ought to have been made on the plaint or summons.

Kingdon shewed cause in Michaelmas Term (Nov. 22).—The question is, what is the proper time and mode for a plaintiff to abandon the excess of his demand. That depends upon the construction of the 63rd section of the 9 & 10 Vict. c. 95, which enacts that "it shall not be lawful for any plaintiff to divide any cause of action, for the purpose of bringing two or more suits in any of the said

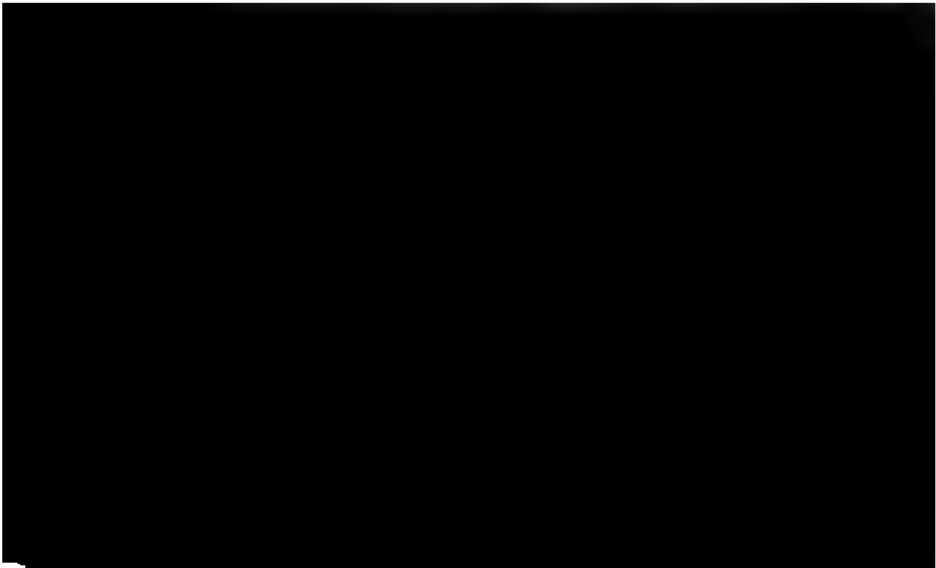
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courts; but any plaintiff having cause of action for more than 20*l.*, for which a plaint might be entered under this Act if not for more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*; and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." By the 13 & 14 Vict. c. 61, s. 1, the jurisdiction of the county courts is extended to 50*l.*, and the same provision as to abandonment applies to the latter sum. There are two answers to the rule: first, that this is not a question of jurisdiction, but of practice; and the authorities establish that a prohibition will not be granted in respect of matters which only concern the practice of an inferior court. In *Ex parte Smyth*(a), the Court of Queen's Bench and also this Court refused to interfere by prohibition, where the Judicial Committee of the Privy Council, having reversed a decision of the Court of Arches in a matrimonial suit, had gone on to retain the principal cause, that form of decree being considered a matter of practice. The doctrine was carried further in *Jolly v. Baines*(b), where a prohibition to the Court of Arches was refused, notwithstanding certain depositions had been taken in contravention of a general order of that Court, founded on the 10 Geo. 4, c. 53, s. 9. In *Mellish v.*



Judges to frame general rules and orders concerning the practice and proceedings of those Courts. Under that provision, they might frame rules respecting the time and mode in which a plaintiff should abandon the excess of his claim; and the rules so framed might be at variance with any rule laid down by this Court, which shews that the question is purely one of practice. [He also referred to the 58th, 59th, 60th, & 78th sections of the 9 & 10 Vict. c. 95.]

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Secondly, the abandonment was rightly made. Since the statute specifies neither the time nor mode of abandonment, it is enough if it be done in court, so as to satisfy the judge that the plaintiff has in fact abandoned the excess. Where a summons in a county court was served at a wrong place, and the defendant had no knowledge of the proceedings until his goods were taken in execution, this Court refused to interfere by prohibition, it appearing that, before judgment, proof had been given to the satisfaction of the judge that the summons had been served as required by the statute: *Robinson v. Lenaghan* (a). In *Vines v. Arnold* (b), a plaintiff, who had a cause of action for 38*l.* 10*s.*, entered a plaint in the county court for 17*l.*, parcel of it. At the hearing of the cause, the plaintiff did not appear; but the defendant being present, and having admitted the claim, the court gave judgment for that amount. The plaintiff having afterwards brought an action in the superior Court for the balance, *Maule*, J., said, "If the plaintiff had appeared, the defendant might have said he was entitled to judgment, unless the plaintiff abandoned the residue of his claim, and the plaintiff might then either have abandoned it or withdrawn." That implies that an abandonment at the hearing is sufficient. *Kimpton v. Willey* (c) shews that it may be made at the trial, or by a mere entry on the judgment. In *Brunskill v. Powell* (d), *Parke*, B., said, "It was urged

(a) 2 Exch. 333.

(b) 8 C. B. 632.

(c) 10 L. J., C. P., 269.

(d) 19 L. J., Exch., 362.

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that, the plaintiff having recovered in the county court 20*l*. upon that demand, he could not recover for the remainder, having once recovered for 20*l*. It does not appear that he entered any disclaimer, or any minute or memorandum upon the records of the county court disclaiming the remainder, at the time that he recovered the 20*l*." [*Parks*, B.—What I there said was, that there must be some entry of the abandonment on the records of the court; but I did not express any opinion as to the time at which it was to be made.] If the plaintiff verbally abandoned the excess at the trial, the clerk of the court might, under the 111th section of the 9 & 10 Vict. c. 95, make an entry to that effect, which would then become a record of the court. The point was adverted to, but not decided, in *The Apothecaries Company v. Burt* (a). The practice in the old county courts was to enter on the declaration an acknowledgment of the receipt of so much as to reduce the debt under 40a: Com. Dig. "County" (C. 8.) Neither the plaint nor summons disclosed the plaintiff's claim: *Dalton's Sheriff*, 216, 428.

Udall, in support of the rule.—The cases of *Ex parte Smyth* and *Jolly v. Baines* have no application, because there the inferior courts had jurisdiction over the subject matter; here the abandonment of the excess is necessary

plaint. The 63rd section, after enacting that a plaintiff shall not divide any *cause of action* to enable him to bring several suits in the county court, but that if his claim exceeds the prescribed amount he may abandon the excess, &c., proceeds thus: "and the judgment of the Court on such plaint shall be in full of all demands in respect of such cause of action." The expression "cause of action" must have the same meaning in the latter as in the former part of the section; and therefore the judgment is to be in satisfaction of the cause of action stated in the plaint, that is, the claim after abandonment of the excess. By the 74th section, the defendant is to appear on a day named in the summons to answer *such plaint*; and, by the 75th section, no evidence shall be given of "any demand or cause of action" not stated in the summons. Unless the abandonment be made by some entry on the plaint or particulars of demand, this inconvenience might arise,—that, if the defendant did not appear at the trial, the plaintiff would obtain judgment for 50*l.*, and the defendant would have no defence, if sued the next day for the excess. Or suppose the defendant appeared, and the plaintiff refused to abandon the excess, what course is to be taken? It is submitted that the plaintiff could not be nonsuited; for a nonsuit proceeds on the ground that the party does not appear to support his claim; whereas the plaintiff appeared to support that which was stated in the plaint as his cause of action.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was a motion for a prohibition against the judge of the county court of Cornwall, to prohibit him from holding plea on a plaint of 50*l.* for goods sold. It appeared, on affidavit, that this was part of a larger sum of 98*l.* odd for goods supplied at different times, which would constitute an entire demand, upon the principle

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laid down in *Grimby v. Aykroyd* (a); and it was contended that the judge had no jurisdiction to try a plaint for part of a demand, which this was, unless a disclaimer was entered on the proceedings of the court at the time of the plaint entered.

The 63rd section of the 9 & 10 Vict. c. 95, provides— [His Lordship read the section.] On the construction of this clause, it has been held, in *Vines v. Arnold* (b), and *Brunskill v. Powell* (c), that the mere fact of suing for a portion of an entire demand is not an abandonment of the excess, but that some act of abandonment in the court is necessary; and it seems that a memorandum of such abandonment ought to be entered on the proceedings of the court. But it does not clearly appear from the wording of this section, nor has it been decided, *when* such abandonment must take place. The plaintiff may abandon, and thereupon, on proving his case, recover the amount to the extent to which the county court has jurisdiction.

The most reasonable course undoubtedly is, that the abandonment should be on the face of the summons or particulars annexed, so that the defendant may at once acquiesce, if he is so minded, instead of being obliged to be at the trouble and expense of attending the county court, in order to compel the plaintiff to abandon the excess above 50*l.* on the hearing; but there is no express

jurisdiction to give judgment and grant execution for 50*l*. We therefore think that the rule should be discharged. It certainly would be well, however, that the county court judges should, under the powers of the 12 & 13 Vict. c. 101, s. 12, make a rule to require the disclaimer to be stated on the face of the summons or particulars of demand annexed.

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Rule discharged, without costs.

MEMORANDUM.

The following gentlemen having been appointed her Majesty's Counsel in last Trinity Vacation, took their seats within the bar on the first day of Michaelmas Term:—*James Campbell*, Esq., of Lincoln's Inn; *Thomas Chandless*, Esq., of Gray's Inn; *William Elmsley*, Esq., of the Middle Temple; *John William Willcock*, Esq., of Lincoln's Inn; *Walter Coulson*, Esq., of Gray's Inn; *Graham Willmore*, Esq., of the Middle Temple; *William Thomas Shave Daniel*, Esq., of Lincoln's Inn; *Frederick William Slade*, Esq., of the Middle Temple; *John Baily*, Esq., of Lincoln's Inn; *John George Phillimore*, Esq., of Lincoln's Inn; *Brent Spencer Follett*, Esq., of Lincoln's Inn; *John Mellor*, Esq., of the Inner Temple; *William Bulkeley Glasse*, Esq., of Lincoln's Inn; *Richard Davis Craig*, Esq., of Lincoln's Inn; *Samuel Warren*, Esq., of the Inner Temple; *Robert Pashley*, Esq., of the Inner Temple; *George William Wilshere Bramwell*, Esq., of the Inner Temple; *James Anderson*, Esq., of the Middle Temple; *William Atherton*, Esq., of the Inner Temple; *Hugh Hill*, Esq., of the Middle Temple; *Charles James Hargreave*, Esq., of the Inner Temple; and *Thomas Emerson Headlam*, Esq., of the Inner Temple.

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HILARY TERM, 15 VICT.

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Jan. 21.

JAMES and Another v. The Hon. W. E. COCHRANE and Another.

An indenture of lease, by which certain coal-mines in the North of England were demised for the term of forty-two years, contained the following covenant by the lessees:—

“And also, that they the said lessees, their executors, &c., or their servants or workmen, should and

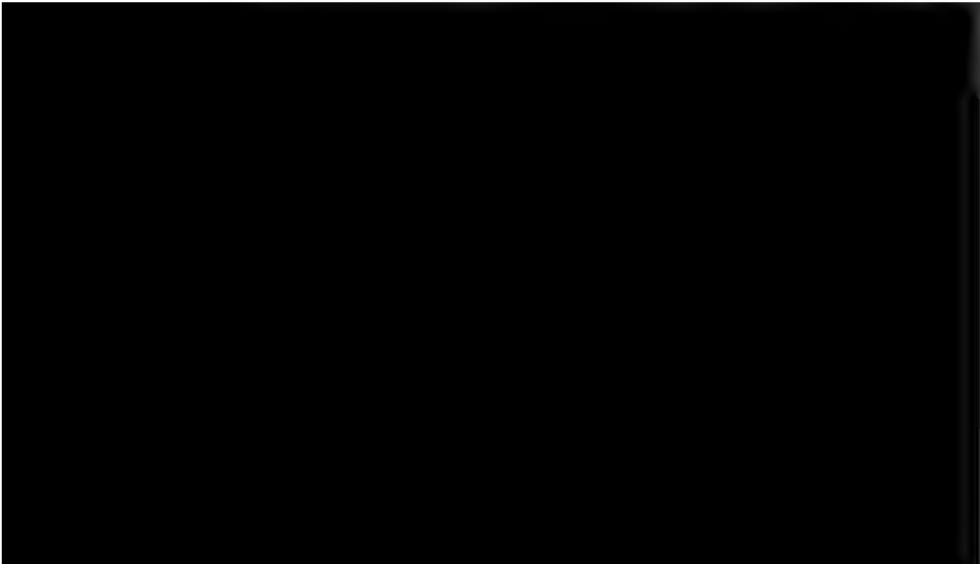
COVENANT.—The declaration stated, that the plaintiffs, on the 5th of October, 1824, by indenture, demised to the defendants a certain estate in the parish of Houghton-le-Spring, in the county of Durham, and all the collieries and seams of coal within and under that estate. This deed contained clauses by which full liberty and power was given to the lessees to dig, sink, work, &c., to make pit and pits, and dig trenches, &c. to get the coal, with also sufficient way leave or liberty of passage over the lands to carry away the coals, and also to erect cabins for the workmen, and all needful engines, &c.; and also “full power and li-

berty to the lessees, their executors, &c. from time to time, and at all times during the continuance of the demise, to make, drive, and use such outstroke or outstrokes, drift or drifts, or other communications, not exceeding the breadth of four yards each, within and through the barrier, bulk, or warren of coal, thereby covenanted as thereafter mentioned to be left unworked of the said colliery adjoining to any other colliery which they then were, or should at any time thereafter during the continuance of the demise, become possessed of, or in which they should have any interest, as should be thought necessary or convenient by the lessees, their executors, &c. for the effectual winning of such adjoining colliery, and for the purpose of bringing and conveying under-ground the coals which, at any time during the continuance of the demise, should be wrought or gotten by them within or out of such adjoining colliery, and which should be thought fit or convenient to be brought and conveyed under-ground from such adjoining colliery unto and into the colliery demised, or the shafts or workings thereof; and thereby and by such outstroke or outstrokes, drift or drifts, or other communications, to bring and convey under-ground from such adjoining colliery unto the colliery demised, or the shafts or workings thereof, and carry away all such coals as should by them be wrought or gotten within or out of such adjoining colliery; and also to draw to bank at any of the pit or pits, sunk or to be sunk by them in any of the lands aforesaid, coals out of such adjoining colliery in such manner as the lessees should think fit, such outstrokes to be stopped up (if practicable) at the end of the term, saving to the lessors the right to pass over the wagon ways on the demised premises, &c.: Habendum for the term of forty-two years from the date of the lease; the leesees to pay to the lessors yearly for the first two years of the term the rent of 20s. for every ton of merchantable coals of &c. (naming the coal); and 17s. 6d. a ton of every other coal, (except coal used in the engines, &c.), which should be gotten during the first two years,

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not exceeding 1000 tons a year; and 22s. and 17s. 6d. a ton (as before) for each ton gotten exceeding that amount; and also paying yearly during the remainder of the term the sum of 1000*l.* yearly for such number of tons of merchantable coal, to be gotten out of the demised collieries, as, at the rate of 20s. and 17s. 6d. a ton respectively, would amount to 1000*l.*, whether the coal should be gotten or not; and also paying yearly during the remainder of the term above the certain yearly rent of 1000*l.* the further rent of 22s. and 17s. 6d. a ton respectively (as before mentioned), above the number of tons for which the yearly rent of 1000*l.* was reserved, payable half yearly; and also paying the further clear rent of 7s. 6d. per ton of coal, which by the lessees should during the term be gotten from and out of any collieries adjoining the demised colliery, by virtue of all or any of the liberties, powers, and privileges granted by the indenture, and which should be drawn to bank in any of the said lands of the lessors, the rent or sum of 7s. 6d. per ton to include outstroke rent, shaft rent, and way leave rent; but in case the coals to be gotten out of such adjoining collieries should be gotten by means of pits in such adjoining collieries, and the water should be conveyed therefrom through the demised collieries, the lessees were to pay the lessors a water-course rent of 2s. 6d. annually. And the lessees covenanted to pay 40s. annually per



of the coal in the said colliery and coal mines thereby demised, and for the keeping open the drifts and watercourses thereof; and for preventing any thrust or creek from damaging the shafts, air courses, and water-courses of the said coal mines thereby demised; and should and would, at all times during the said term thereby demised, work all and every the said colliery and coal mines, seam and seams of coal thereby demised, in and according to the best and most approved method then adopted and used in the working of the collieries and coal mines, and should not nor would, at any time or times during the continuance of the said term thereby demised, work the walls or pillars of coal so to be left unwrought as aforesaid." The deed also contained the following covenant, by which the lessees covenanted that "they, their executors, &c., or their servants or workmen, should and would once in every month or oftener during the said term at their own expense draw to bank at some of the pits or shafts of the said collieries or coal mines thereby demised, (provided that the same should be pits or shafts from which the coals of the thereby demised colliery should not be worked by an out-stroke), and lay in some convenient place in that behalf upon the said lands and premises of the said lessors for the said lessors, their heirs or assigns, all the manure, compost, and dung to be made and bred by the horses employed under-ground in working the said demised collieries; and should spend and bestow so much thereof, and of all such dung, &c., as should be made or bred or arise in, under, or upon the said estate, lands, and premises of the said lessors, or any part thereof, as might be necessary for that purpose, in dressing and manuring any lands or grounds which the said lessees &c. might, during the said term, occupy as tenants to the said lessors:" and further, that the lessees should and would, from time to time and at all times during the demise, sufficiently fence the pits and shafts to be sunk in any of the demised lands; and also that the

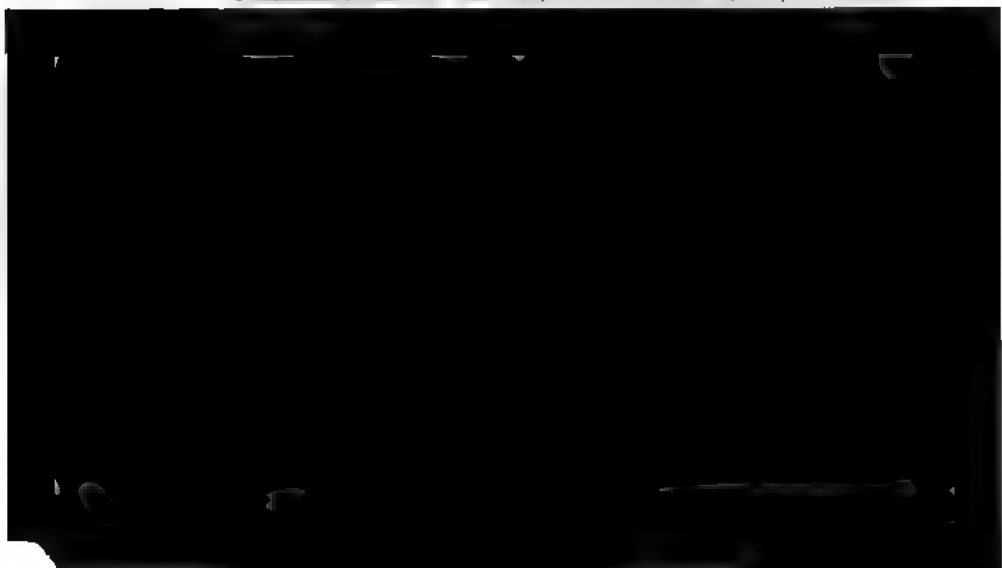
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lessees would deliver up to the lessors at the end of the term all such pits, &c. And the lessors covenanted, that the lessees might work any of the seams of coal they might think fit; and also that the lessees might, during the demise, by such outstroke or outstrokes, drift or drifts, as might be so made as aforesaid, bring and carry underground from the demised colliery unto any adjoining colliery, of which the lessees might then or thereafter be possessed or have an interest in, or to the shafts or workings thereof, all coals &c., as should be gotten by the lessees within the demised colliery, without paying to the lessors any outstroke rent for the same, such rent (if any) being payable to the owners of the adjoining colliery.

The declaration then set out another deed between the parties of the 11th of March, 1825, whereby (inter alia) the lessees were empowered, in case they should have expended 5000*l.* in sinking a pit or pits in the demised lands, or, in case the demised collieries should become incapable of being worked at a profit, to determine the lease at the end of the fourth, seventh, tenth, (and other years therein mentioned) of the term.

The eleventh breach alleged that, after the making of the indentures and during the continuance of the term, and at times respectively more than a month before the commencement of the suit, certain manure, &c., was made



would be worked by an outstroke, yet the defendants had not made such pit or shaft &c.; by reason whereof the said manure so made &c. could not be and was not at any time drawn to bank &c.—General demurrer, and joinder.

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Manisty (*Hugh Hill* with him) in support of the demurrer, contended, that although manure had been bred within the demised mines, the lessees were not bound to make a pit upon the premises; that the deed did not contain any *express* covenant to that effect, and that, as the obligation would cast much expense upon the lessees, the covenant could not be introduced by implication; that the covenant itself, upon which the breach was assigned, gave the lessees the power of working the mines by “outstroke,” namely, by means of pits upon the adjoining premises; but that, if no such power was given, still the lessees would only be liable for a breach of their lease by so working the mines; that the lease, no doubt, contemplated the case of pits being on the premises; that by the term “barrier” in one of the clauses of the lease, was meant an ungotten portion of the coals, to be left to protect the mines against water—that the lessees were at liberty to get the coal of the demised premises by outstroke, or they might use the demised mines for the purpose of getting coal on an adjoining estate by passing *through* the demised mines, by breaking the barrier from the outside; that the lessees were not bound to work the mine at all, although they were under the obligation of paying after the expiration of the two first years of the lease the stipulated minimum rent of 1000*l.* per annum, and that the second instrument into which the parties had entered supported this view of the defendants’ construction of the first lease.


Aspland (*Atherton* with him) contra, contended that, upon the manure being made within the demised mines, the lessees were bound to make a pit—that such was the

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true construction of the covenant appeared from various clauses in the instrument which had reference to a pit or pits sunk upon the premises; that the nonpayment of rent for the two first years of the term afforded an argument that that time was given for getting at the coal, and therefore that the mines were to be worked; and that, as the deed did not give the lessees the power of working the demised mines by outstroke, they were to be worked by pits upon the premises (a).

Manisty was not called upon to reply.

POLLOCK, C. B.—I am of opinion that the plaintiffs are not entitled to judgment; and I so express myself, as I find it more difficult to say to what the plaintiffs are entitled, than to point to the precise defence. It appears to me to be clear, that if the parties had intended that a pit should be made, or that the mine should be worked at all events, they would have provided for those events by distinct and express covenants. It appears to me to be clear, that the expression, that they "would at all times work the said colliery according to the best and most approved method," must be read and understood as subject to the introductory terms in the clause, "in working and carrying on the colliery." I do not find any absolute covenant to work the mine, or to make a pit. [His Lordship read



not be worked by an outstroke," would immediately apply, for then it was worked by an outstroke, and therefore the covenant really would not be broken, and it appears to me it ought to be read in that way. But then the breach proceeds to contain a further allegation. [His Lordship read it.] But I cannot find any covenant which supports the latter part of the breach, and, as that is so, the plaintiff has failed in supporting it, and consequently the defendants are entitled to our judgment.

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PARKE, B.—I am of opinion that the defendants are entitled to judgment. I confess that I am not entirely free from doubt with respect to the construction of the particular covenant as to the working of the mine. The breach assigned is upon the following covenant. [His Lordship read the clause upon which the breach was assigned.]

Now I think that this clause, when taken alone, does not contain any implied covenant on the part of the lessees to make a pit upon the demised premises. According to the rule of law on this subject,—and the whole case turns upon the application of that rule—no precise words are necessary to constitute a covenant; provided we are able to collect an agreement by the parties that a certain thing shall be done, that will be sufficient to enable us to say that a covenant is created. But we must be satisfied that the language does not merely shew that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done. Now it is impossible to read the covenants of this lease without supposing that the parties contemplated that the pits would probably be made, for it cannot be supposed that the lessees would enter into such a lease as this without intending to work the mines; and I think it appears, from the different parts of this instrument, that if the mines were worked, the parties thought they would be worked by means of pits made on the demised premises.

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But the question is, whether we can collect from the whole instrument, that there is a binding agreement that a pit should be made. I think that the explanation of this covenant which has been given by my Brother *Martin* is quite satisfactory, namely, that the parties supposed there would be a pit upon the demised premises, and therefore they stipulated that all the dung and manure bred by the horses in winning the coal under the premises, which would of course be dropped at some distance from the pit, should at any rate be carried there; that is to say, if a pit did exist, the manure should be carried there; but that the provision should not extend to any pit in the adjoining colliery, as that would be at a much greater distance, and probably some compensation would have to be made to the owner of such estate for outstroke rent, in taking the thing to the demised premises. The terms now sought to be implied by no means follow from this covenant itself, and therefore the question is, whether any such terms can be implied from the other covenants in the indenture. Now, if there were a positive covenant to work the mines, I own I feel strongly impressed with the opinion that there would be a covenant on the part of the lessees to make a pit for the purpose, because the mines can only be worked by means of a pit on the demised premises, or by means of outstroke pits, and if

would be entitled to recover from the defendants for the breach of the covenant in making an outstroke for any purpose other than that for which they are expressly permitted to make it by the lease. The question, whether the plaintiffs are entitled to recover damages for the alleged breach by making an outstroke through the barrier for a different purpose, must be decided when that question comes expressly before the Court. If there were a positive covenant compelling the lessees to get the coals under the demised premises, I should come to the conclusion that the parties meant that the coals should be got by means of some pit, not being an outstroke pit, and if such a pit would necessarily be made for the purpose—that is, upon the assumption that a positive covenant exists in this agreement to work the mines at all events—then, as I said before, there would be no doubt that the parties contemplated that the mines should be worked. But whether there is any obligation to work the mines, depends upon the clause to which reference has already been made. The clause is this. [His Lordship read it (a)]. That is the only stipulation respecting the working of the mine. Now the first member of this covenant appears to apply only to cases where the lessees do work and carry on the mine, that is, “in working and carrying on the colliery and coal mines, seams and seam of coal thereby demised.” Those words, “in working,” probably mean no more than that, *if* the lessees should work, they should work in that manner. It is very true that the words “should and would at all times during the said term,” are not accompanied with these particular words “should and would in working and carrying on the colliery and coal mines.” That leads me to doubt whether the second member of the covenant be not obligatory on them to work, as not applying to cases in which they chose to work, but to those cases in which they are to work in the


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(a) Ante, p. 172.

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best and most approved method then adopted. However, I agree that the whole must be taken together, and if the first member of this covenant would have no application but to cases where the lessees chose to work, then all that follow would necessarily have the same construction. By the terms of the lease, during the first two years of the term, the lessees are not responsible for any rent, as they are not bound to work. It is rather a curious consequence, that during the two first years of the term, if they are not bound to work, they are not bound to pay any rent: with respect to the subsequent years, they are bound at all events to pay 1000*l.* a year. There is no doubt that the parties contemplated the working of the mines during the first two years; but they have not introduced words into the indenture making it obligatory upon them to work at all. The consequence is, that as it is not made out to my satisfaction that there is any such covenant as imposes an obligation on the defendants to make a pit, I think that the defendants are entitled to the judgment of the Court.

ALDERSON, B.—I am of the same opinion. I think there ought to be a very clear and unambiguous covenant to compel the defendants to do such an act as is now sought to be imposed upon them, and which is well known to be one of the most expensive and important in mining opera-



plated that it most probably would be a matter of convenience that a pit should be there; and they seem to me to have stipulated that the lessees should only break out of the estate demised for the purpose of getting the adjoining coals. I am not satisfied with the explanation which the learned counsel for the plaintiffs gives of the covenant on which the breach is assigned. According to his construction, some of the terms of that covenant are altogether useless. If of necessity the coals must be brought from some point within the demised premises, they could not be coals of any adjoining colliery worked by an outstroke. Now, I think that the words "pit or shafts of the collieries or coal-mines thereby demised" mean no more than pits or shafts at which the coals of the tenant are to be brought to bank; and if that meaning be put upon the first words of the clause, it follows that the same meaning is to be given to the second part of it; and by this construction full effect is given to every word in the clause. But then it is contended, that the coals in the demised ground cannot be worked by outstroke. But I find that one of the clauses of the lease contains an additional provision, that the parties shall be at liberty to work the coals from the colliery, and to carry them into any adjoining colliery or coal mine which they were or should at any time thereafter, during the continuance of the demise, become possessed of or entitled to, paying no outstroke-rent to the lessors; seeing that the proper outstroke-rent in that case ought to be paid to the people to whose premises the coals were brought. It is very true the words are "by means of such outstroke as aforesaid." And it may be a breach of that covenant to make any such outstroke otherwise than from within the demised mines; and therefore the lessees may be liable to an action for damages for having done so; but I think that in that case the amount of the damages, if any, would be very small, seeing that the amount could be no more

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than the disadvantage which might accrue to the party by his having his land liable to be flooded, in consequence of the improper making of the opening through the barrier. Therefore, I do not see any covenant which binds the defendants to *make* any pit for the purpose of bringing the manure to bank. But I think that the real meaning of the lease is, that if any manure should be brought to bank upon the premises in question, that is, upon the surface land, then it shall go to the plaintiffs; and that the defendants are bound to keep a monthly account of all the manure so brought to bank. If the manure is brought to bank from the collieries, and the demised premises are worked by outstroke, then the manure (which may be at some considerable distance) is not provided for by the covenant upon which the plaintiffs are now proceeding. I quite agree with what the Lord Chief Baron has said upon the clause about working the mines, as I think that the whole clause refers to the *manner* of working; inasmuch as the clause provides that the lessees shall, in working, leave certain pillars, and that they shall work in seams according to the custom of the country; and that the pillars, which were first provided for, shall not be taken away; and then that, in working, they shall not do any damage, so as to subject the mine to be flooded with water, and so on in every case, provided that should work

meant that the lessees were to work at all events. But as it is situated between two others, which refer merely to the modes of working in case the mines are worked, I am forced to the conclusion that the proper construction is that which has been put upon it by my Lord and my Brother *Parke*.

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MARTIN, B.—I am also of opinion that this breach is bad. The breach in substance is, that the defendants did not nor would make a pit of the said collieries from which the coals of the demised collieries were not worked by an outstroke. If the plaintiffs' argument is correct, then substantially it is an obligation on the lessees to make a pit for the lessors. Now I entirely concur in what has been said by my Brother *Parke*, that we must look through the deed to see whether it contains anything from which we can infer that there is a positive obligation upon the lessees to make a pit. The breach, after containing a variety of averments with respect to the manure, concludes by charging a breach of a particular covenant, and therefore I presume the plaintiffs principally rely upon that particular part of the deed. Now, upon considering that part of the deed, I have not the least doubt that the parties did not thereby intend that a pit should be made. The covenant contemplates the making of manure by horses in working in the pits; and the substantial provision of the covenant is the same as if it had been that "the manure so made shall be used upon a portion of the land occupied by the lessees upon the surface;" or as if it had been the ordinary covenant in a farm lease, that the manure made upon the land shall be used upon the land. Now it would be exceedingly unusual, in a case where the amount to be expended would be as much as 5000*l.*, as appears by one of the deeds, to imply a covenant, where the parties themselves abstain from making it in express terms; and it would require very strong words of implica-

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tion to induce me to draw any such conclusion. [His Lordship, after reading the covenant upon which the breach was assigned, proceeded:] If that covenant had stood alone, without the proviso, it would have meant that the lessees were to bring the manure to the pit by which they were to get the coal, and to place it upon this land, which would imply the bringing of it from the bottom of the pit to the surface, which might be at a considerable distance, and to which there might be great difficulty of access. It stands upon the proviso that the pit shall be upon the land; but it does seem to me impossible to draw any conclusion from this covenant alone, that any obligation is cast upon the lessees to make a pit upon the land. With respect to the rest of the deed, it seems to me that the parties thought it likely a pit would be made upon this land, but they have expressly avoided entering into any express covenant upon the subject. If there had been any necessity for working the coal by a pit on the land, the lessees would have made the pit for their own benefit, but we cannot say that they have been guilty of a breach of the covenant in having made this outstroke, without the right to make it by reason of not having the adjoining mines. If they had the adjoining mines, I think they could legally make the outstroke. But even if they had made an outstroke without being justified in so doing, for

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FELL v. GOSLIN and MORGAN.

Jan. 22.

ASSUMPSIT.—The declaration stated, that, on the 20th of September, 1849, a certain agreement in writing was made by the defendants with the plaintiff, signed by the defendants, in the words and figures following:—"To Mr. W. Fell. In consideration that you will sell to Mr. Farren the distillery and premises situate at &c., and will take Mr. Farren's acceptance, to be dated 29th of September, 1849, for 400*l.* (the amount of the purchase-money) and interest, payable at six months after the date, we undertake and guarantee that the said sum of 400*l.* and interest shall be duly paid to you when the said acceptance arrives at maturity, in the proportion of 200*l.* each." The declaration, after containing averments of the identity of the parties; that the plaintiff did then sell to Farren the said distillery, &c., and then took Farren's acceptance, dated &c., as mentioned in the agreement; that the acceptance had become due and payable before the commencement of the suit; that the acceptance was dishonoured &c. when the same became due &c.; and that Farren had never at any time paid the plaintiff the amount of the acceptance or any interest thereon; of all which the defendants afterwards, on &c., had due notice, and were then requested to pay to the plaintiff the amount of the said acceptance,—alleged that the defendants had not nor had either of them ever paid the plaintiff the amount of the said acceptance or any part thereof, or any interest thereon, to the plaintiff's damage &c.

Assumpsit by the plaintiff against the defendants jointly, upon the following guarantee:—"In consideration that you will sell to Mr. F. the distillery situate at &c., and will take Mr. F.'s acceptance, to be dated 29th of September, 1849, for 400*l.*, (the amount of the purchase-money), and interest, payable at six months after the date, we undertake and guarantee that the said sum of 400*l.* and interest shall be duly paid to you when the said acceptance arrives at maturity, in the proportion of 200*l.* each:—*Held*, that the defendants were severally liable to the plaintiff to the extent only of 200*l.* each.

General demurrer by each of the defendants, and joinder therein.


The defendants' points for argument were—that the action could not be maintained against the defendants jointly, the undertaking being not a joint undertaking for the payment of the 400*l.* and interest, but a several under-

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taking of each to pay 200*l*. That if the agreement could be construed as an agreement by the two jointly, it was, in that case, an undertaking by the two that each should pay his proportion; and that, upon such construction, the declaration was inaptly framed, inasmuch as it ought to have shewn a several default by each, or by one of them, and a further breach by the two of the collateral undertaking to guarantee the defaulting party.

Willes, in support of the demurrer, on the part of the defendant Goslin.—The plaintiff seeks, by joining the two defendants in this action, to make each liable to the extent of 400*l*. But, by the terms of the guarantee, they are severally liable to the amount of 200*l*. only.—He was then stopped by the Court.

Wordsworth contra.—It is a general principle of law, that if several persons stipulate for the performance of an act, they are impliedly bound *jointly* and not severally; and that there must be express words creating a several liability, in order to render them separately responsible. The question then is, whether this instrument contains any such stipulation. In *Byers v. Dobey* (a) it was held, that a contract made by two partners to pay a certain sum of money to a third person *equally out of their own private*



gathered from the language they have adopted.] In *Lee v. Nixon* (a) it was held, that where it appears upon an instrument that a promise by two contractors is intended to be joint, it may be treated as such, although the promise be in terms several only. By the terms of the present instrument, it appears to have been the intention of the parties that the plaintiff should have the joint security of both the defendants. [*Martin*, B.—Suppose A. and B. insure a ship for 1000*l.* to the extent of 500*l.* each; neither party would be liable for more than 500*l.*] If the defendants had *expressly* stipulated that they would be *severally* liable only in 200*l.*, as in *Collins v. Prosser* (b), the defendants' argument would be correct.

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POLLOCK, C. B.—I think this case is distinguishable from that of *Byers v. Dobey*, where it is quite clear that the contract sued upon was *joint*; and the Court accordingly held, that the defendants ought to be jointly sued upon it. The question here is, what did these parties mean by the language they have here used? I entertain no doubt whatever that they meant to indemnify the plaintiff to the extent of 200*l.* each, and to that amount only; and I think that they have expressed their meaning with great clearness by the language they have adopted. They are each, therefore, only liable for that amount for which they have stipulated by their guarantee. Our judgment must therefore be for the defendants.

PARKE, B.—It is clear that the defendants are only *severally* liable to the extent of 200*l.*, it being a separate contract by each, upon the consideration expressed in the agreement. The ground of the decision in *Byers v. Dobey*, as put by Lord *Loughborough*, is not so satisfactory as that

(a) 3 N. & M. 441.

(b) 1 B. & C. 682.

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upon which it was rested by Mr. Justice *Wilson*, who said, "The words *private cash* could only mean, that the rent should be paid out of the partnership stock; but the contract was joint as between *Dobey* and *Bethel*" (the two defendants) "as relating to a third person." The contract there was clearly joint as to one part of it. That case, therefore, does not stand in our way; and I think that, upon the terms of this instrument, the expressed intention of the parties is clear.

ALDERSON, B., and MARTIN, B., concurred.

Judgment for the defendants.

C. Pollock was to have argued for the other defendant, but was not called upon.



Jan. 23.

NIXON v. PHILLIPS.

The 3 & 4
 Will. 4, c. 98,
 s. 7, by which

ASSUMPSIT on a bill of exchange, dated 6th March, 1849, for 116*l.*, drawn by the defendant upon one E. Aus-



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sum of 106*l.* and no more; and that the plaintiff should forbear and give day of payment of the said sum of 106*l.* from the time of lending and advancing the same, to wit, from &c., until &c.; and that, for such forbearance and giving day of payment of the said sum of 106*l.* as aforesaid, the defendant should pay the plaintiff a certain sum of money, to wit, the sum of 10*l.*; and that, for securing the re-payment of the said sum of 106*l.*, and also the payment of the said sum of 10*l.*, on the day aforesaid, the defendant should make and deliver to the plaintiff a certain bill of exchange [describing it]. The plea then averred, that in pursuance and part performance of the said unlawful and corrupt agreement, the plaintiff did, afterwards and before the commencement of this suit, to wit, on &c., lend and advance to the defendant the said sum of 106*l.* and no more; and the defendant did then, for securing the re-payment of the said sum, and also the payment of the said sum of 10*l.* on the said day, make and deliver to the plaintiff the said bill of exchange in the declaration mentioned; and the plaintiff then, to wit, on &c., received the same from the defendant upon the terms aforesaid. And further, that the said sum of 10*l.*, so agreed to be given and paid to the plaintiff for such loan and forbearance as aforesaid, exceeds the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the statute &c. Verification.

Replication.—That the said bill in the declaration mentioned was drawn and indorsed in manner and form therein alleged; and the said agreement in the plea mentioned was made as therein mentioned, after the making and passing of a certain Act of Parliament (the 3 & 4 Will. 4, c. 98). Verification.


Rejoinder.—That the said bill of exchange was made and indorsed, and the said agreement in the said plea mentioned was made as therein mentioned, after the making, passing, and coming into operation of a certain Act of Parliament (the 2 & 3 Vict. c. 37). And further,

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that the said agreement in the said plea mentioned did relate to and give to the plaintiff a certain security upon certain lands, tenements, and hereditaments, and a certain interest therein, to wit, an equitable mortgage of a certain piece or parcel of ground situate at &c., by means of the deposit by the defendant with the plaintiff of a certain indenture of lease of the said piece or parcel of ground, dated, to wit, &c., and made &c.; and also a certain other equitable mortgage of the said piece of ground and certain premises erected thereon, by means of the deposit by the defendant with the plaintiff of a certain indenture of mortgage of the said piece of ground and premises, dated &c., and made between &c.—Verification.

Special demurrer, on the ground that the rejoinder was wholly immaterial; that the bill of exchange was protected by the 3 & 4 Will. 4, c. 98, which had not been repealed by the 2 & 3 Vict. c. 37.—Joinder in demurrer.

J. S. Cross, in support of the demurrer.—The bill of exchange upon which the plaintiff has declared is protected by the 3 & 4 Will. 4, c. 98, s. 7. That section protects all bills, the payment of which does not exceed the period of three months, from the penalties imposed upon usurious transactions. Now the 2 & 3 Vict. c. 37, s. 1, which enacts that bills of exchange and notes not having more than



2 & 3 Vict. did not absorb the stat. of Will. 4, but that they might well stand together. In that case, the rejoinder did not allege, that the bill was secured by a mortgage on land, but the decision of the Court substantially governs the present case. [*Parke, B.*—Your argument is, that a bill not having more than three months to run is not affected by reason of its being secured by a mortgage upon land. If that be so, it appears to me that the legislature have made an oversight, as they never could have intended that more than 5*l.* per cent. should be taken upon land. *Thibault v. Gibson* (a) shews, that the 2 & 3 Vict. c. 37, does not repeal the 12 Anne, st. 2, c. 16, which relates to usury, but that the effect of it is merely to take out of its operation all contracts other than such as relate to land.]

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Bovill contra.—It seems to have been the impression of the Court in *Clack v. Sainsbury*, that if the defendant had rejoined, that the bill was secured by a mortgage on land, the transaction would not have been protected by the 3 & 4 Will. 4, c. 98, s. 7. The protection which that section affords must be taken to be confined to transactions upon bills and notes *alone*. The section, in speaking of interest taken “*thereon*” or secured “*thereby*,” clearly has reference to the bill or note itself. The language of that section cannot be construed to apply to all cases where a bill or note may have been given. That being so, the statute of 2 & 3 Vict. c. 37, s. 1, extends the protection given by the 3 & 4 Will. 4, c. 98, provided the loan be not upon landed security. [*Parke, B.*—The question would be, whether the transaction was a *bonâ fide* one upon the bill itself: *Doe d. Haughton v. King* (b).] In *Berrington v. Collis* (c), a loan of money of more than 5*l.* per cent., upon the security of the deposit of a lease, a warrant of attorney, and a promissory note, was held not to be protected by the 3 &

(a) 12 M. & W. 88. (b) 11 M. & W. 333. (c) 5 Bing. N. C. 332

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4 Will. 4, c. 98, s. 7. [*Parke, B.*—You must go the length of contending that the statute of Will. 4, does not protect a bill or note where any other security, whatever is given with it. If for instance a hogshead of sugar were deposited by way of security, you must say that the bill or note would not be within that statute.]

Cross in reply.—In *Connop v. Meaks (a)*, it was held that the 3 & 4 Will. 4, c. 98, s. 7, protected not only a bill of exchange payable at three months, but that it extended also to a warrant of attorney given to secure the payment of the bill.—He was then stopped by the Court.

POLLOCK, C. B.—It is hardly necessary to say more than that this question is substantially decided by the case of *Clack v. Sainsbury*, from which I feel no reason to differ. I am by no means certain that the legislature did not intend that the statute should not have that meaning attributed to it which its language imports; for there is a very great difference between the value of loans of money advanced for periods not exceeding three months, and where the money is advanced and not to be repaid for ten or twelve months. There is, therefore, a good reason why a larger amount of interest should be allowed to be taken on a bill or note payable at three months, even although

lature, in putting money secured by bills of exchange and promissory notes upon the same footing as money secured by land; but we must construe the Act of Parliament according to its obvious meaning. The decision of the Court of Common Pleas leads to the conclusion, that any amount of interest secured upon a bill of exchange, having only three months to run, although there be the additional security of landed property, may be a valid transaction. If Mr. *Bovill's* argument be correct, in the case of a bill of exchange, upon which interest exceeding 5*l.* per cent. is payable, if *any* additional security of what kind soever be given for the payment of the interest, the whole transaction would be invalidated. I think that construction of the 3 & 4 Will. 4, c. 98, too narrow, and cannot be supported.

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ALDERSON, B.—If Mr. *Bovill's* argument be correct, that the 3 & 4 Will. 4, c. 98, applies to bills and notes *only*, there would have been no necessity for the insertion of the provision with respect to the security of landed property in the 2 & 3 Vict. c. 37.

Judgment for the plaintiff.

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Jan. 19.

FRITH and Others v. WOLLASTON.

To an action on a judgment of the Supreme Court of the colony of the Cape of Good Hope, the defendant pleaded in bar, that, before the recovery of the judgment, by an Ordinance of that colony relating to the administration and distribution of insolvents' estates, it was enacted, that the Supreme Court might, upon petition of the insolvent, accept the surrender of his estate, and place it under sequestration in the hands of the Master of the Court; and that further execution of any

DEBT on a judgment of the Supreme Court of the colony of the Cape of Good Hope.

Plea (in substance), that before the recovery of the judgment an Ordinance was duly enacted at the colony of the Cape of Good Hope, by the governor, with the consent of the legislative council, for regulating the due collection, administration, and distribution of insolvent estates within the colony; whereby it was enacted, that it should be lawful for the Supreme Court, upon the petition in writing of any person setting forth that he was insolvent, and desirous of surrendering his estate for the benefit of his creditors, to direct such person to appear before it, to be examined touching his insolvency; and, upon such proof as the Court should think fit, that the Court might accept the surrender of such estate, and by order place the same under sequestration in the hands of the Master of the Court; that upon the party obtaining the order for sequestration, he should forthwith lodge it with the sheriff of the colony, who should register it and deliver such order to the Master of the Court, and that the Master, when the order had been made at the instance of creditors, should notify it in

against any insolvent or his estate for the amount of any debt or sum of money, should, after any order for sequestration of such estate had been lodged with the sheriff, be stayed during the pendency of such sequestration; and that all actions pending against any insolvent for any debt or demand proveable against the estate, and all proceedings therein should, upon any order being made for the sequestration of such estate in virtue thereof, be stayed. And it was thereby further enacted, that the Master, after the estate had been sequestrated, should give notice thereof in the Gazette, and appoint two public meetings of the creditors for receiving proofs of the debts, and for electing trustees for the collection, administration, and distribution of the insolvent's estate and effects, which election might be confirmed by decree of the Court. And the Ordinance further enacted, that every order made for placing any estate under sequestration as insolvent, should in law divest the insolvent and any person administering his estate for him, and vest in the Master, for the purposes of the sequestration, the present and future estate, moveable and immoveable, personal and real, &c., wheresoever the same might be known or found; and that, upon the decree of the Court being made, the estate should vest in the trustees thereby confirmed for the purposes of the sequestration; and that upon any such trustee being confirmed, he should forthwith give notice in the Gazette of the sequestration, and of his appointment; and the Master was required thereupon to appoint a third meeting of the creditors for receiving proof of debts, and for receiving the report of the trustees as to the condition of the estate, and for giving directions to the trustees for the management thereof; and that they should, within six months after their appointment, lay before the Master an exact account, &c., which on motion to the Court might be afterwards allowed, which the Court might confirm; and the trustees should, upon the demand of the creditors, distribute the estate according thereto; and that

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the remedy of any creditor to obtain payment of any dividend should be, during the continuance of the office of the trustees, by motion to the Court. The plea then averred that, after the recovery of the judgment, the defendant, being then resident in the colony and being insolvent, duly petitioned the Court, and was examined, and the Court by order accepted the surrender of his estate, and placed it under sequestration; that the defendant forthwith lodged the order with the sheriff, and the sheriff registered it, and delivered it to the Master, who notified it in the Gazette, that the defendant then lodged with the Master a list of his creditors; that the Master then laid an attachment on the defendant's estate; that the Master, by due notice, did appoint two public meetings of the creditors &c.; that the plaintiffs proved the amount of the judgment against the estate before the Master, who then admitted the debt; that afterwards a trustee was duly appointed, whose appointment was confirmed by decree of the Court; that afterwards the Master appointed a third meeting of the creditors for receiving proof of debts, and for receiving the report of the trustee as to the condition of the estate &c.; that the trustee, within six months, laid before the Master an exact account of the estate, and a general plan for the distribution of the assets, which was confirmed by the Court, and that afterwards, in pursuance of such plan,

for the purpose of protecting the estate of the debtor in the hands of the officer of the Insolvent Court in the colony; but it does not enact that it shall be taken to operate as a satisfaction and discharge of the estate or person of the debtor. The law relied upon is merely a local law, which suspends the proceedings upon the judgment for a particular purpose, and cannot be pleaded in bar to an action on the judgment in this country. If this defence were allowed, the debt might be barred by the Statute of Limitations. In *Snook v. Mattock* (a), it was held that, on a scire facias to revive a judgment against an executor, it is not a good plea that a writ of error is depending on the judgment.

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Lush contra.—The Court will not look out of the record. It therefore will not assume that there are other laws in force in the colony upon this subject. This is an action upon a foreign judgment, and the rules of the country where the judgment was obtained govern all the proceedings which may be taken upon that judgment. If this plea would have been a good answer to an action on the judgment in the colony, it must be equally so to an action in this country. Now by the law of the Cape all proceedings upon the judgment are to be stayed, and therefore the plaintiff is disabled from taking any legal proceedings whatever upon the judgment. [*Martin*, B.—I should have thought that the defendant's remedy would be by application to the Court to stay the proceedings, and not by way of plea. *Parke*, B.—The law does not enact that the contract shall be void, or that the debtor may plead the law as a defence to an action upon the judgment.] Where a personal action is suspended by the act and consent of the party himself who has the thing suspended, the action is extinct and gone for ever; but where the suspension is by

(a) 5 A. & E. 239.

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operation of law it acts as a release and discharge pro tanto, as long as the suspension continues, although the right of action may afterwards revive: 2 Dyer, 139 b, 140 a. In the one case the right of action is suspended for ever, in the other it is merely suspended for a time. There is no analogy between the case cited, namely, where execution is stayed by writ of error, and the present.

Willes replied.

POLLOCK, C. B.—I am of opinion that the plaintiffs are entitled to judgment. This is an action on a judgment of the Cape of Good Hope, to which the defendant has pleaded—and the plea at the most amounts only to this—that the plaintiffs' right to sue upon that judgment is suspended during a certain time. If we were now to give judgment for the defendant, and if to-morrow the suspension were removed, and the plaintiffs were to bring an action upon the judgment, the defendant would plead that he had obtained judgment, and there would be an end to the plaintiffs' right to recover. Upon this short ground I think the plaintiffs ought to succeed.

PARKE, B.—I am of the same opinion. Whatever affects the contract itself may be made use of as an au-

it against the real or personal estate in a foreign country, is gone. At all events, it seems to be clear that the law of the Cape of Good Hope cannot be taken to affect the debtor's real estate out of that country, which, being extra-territorial, is also out of the jurisdiction of the Court where the judgment was obtained.

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ALDERSON, B., concurred.

MARTIN, B.—I am also of the same opinion. The plea is no answer to the action. At most, the execution is stayed during the pendency of the sequestration; and the plea does not even state, that at the time of action brought the sequestration was pending.

Judgment for the plaintiffs.

BRIDGMAN & Others v. DEAN.

Jan. 23.

ASSUMPSIT.—The declaration stated that, before and at the time of the defendant's promise hereinafter mentioned, to wit, on &c., the defendant was justly indebted to the plaintiffs in divers unliquidated debts and demands, whereof the defendant then had notice, theretofore accrued to the plaintiffs; that is to say, for so much money as the plaintiffs reasonably deserved to have from the defendant (to be paid by the defendant to the plain-

A declaration stated that the defendant was indebted to the plaintiffs in divers unliquidated debts, namely, for so much as the plaintiffs deserved to have of the defendant for work done by the

plaintiffs as attornies for the defendant; that the plaintiffs alleged that the said debts amounted to 171*l.* 9*s.* 8*d.*, and the defendant to 147*l.*; that it was agreed that the dispute between them should be put an end to, and the amount of the debts fixed at 150*l.*; that the plaintiffs should relinquish their claim to the residue; and that the debts should be satisfied upon the terms of the defendant agreeing to pay the plaintiffs 150*l.*; that the disputes were ended; that the debts were agreed and fixed at 150*l.*; that the plaintiffs had not made any further claim; and that the debts were satisfied upon the terms in that behalf. Breach, non-payment of 150*l.* Plea, that the plaintiffs did not, "one calendar month before the commencement of this suit, deliver to the defendant a signed bill:"—*Held*, that the declaration, at the best, amounted to a special count on an account stated, and that the plea was good in form and substance.

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tiffs on request), for work done and for materials, by the plaintiffs, as the defendant's attornies and solicitors, and otherwise, for the defendant, at his request, and for jour- nies, &c., and for money paid; and that, the defendant being so indebted to the plaintiffs, thereupon and before the making of the defendant's said promise, to wit, on &c., it was alleged and insisted by the plaintiffs, that their said debts and demands amounted to, and that they reason- ably deserved to have in respect thereof from the defend- ant, a sum of money then in that behalf claimed by the plaintiffs exceeding the sum of 150*l.*, to wit, the sum of 171*l.* 9*s.* 8*d.*, which said amount the defendant then denied, and alleged that the said debts and demands amounted to a less sum than that so claimed by them, to wit, the sum of 147*l.* only; and a difference and dispute having so arisen, and being pending between the plaintiffs and the defendant touching the amount of the said debts and de- mands, thereupon afterwards and before the commencement of this suit, to wit, on &c., it was mutually agreed by and between the defendant and the plaintiffs, that the said difference and dispute should be put an end to, and the amount of the said debts and demands should be agreed upon and fixed by and between the defendant and the plaintiffs at the sum of 150*l.* and no more; and that the plaintiffs should relinquish and give up all right and claim

that the plaintiffs then relinquished and gave up all right and claim to the residue of the said sum so previously claimed by them; and that the said first-mentioned debts and demands thereupon were settled and satisfied upon the terms aforesaid; of which the said defendant then had notice. Breach, non-payment of the said sum of 150*l*.

Plea, that the action was commenced after the passing of the statute 6 & 7 Vict. c. 73; and that the said supposed debts and demands of the plaintiffs were, before and at the time of the making of the said promise in the declaration mentioned and still are debts and demands claimed by the plaintiffs to be due to them from the defendant, for and in respect of certain business theretofore done by the plaintiffs as attornies and solicitors for the defendant; and that the plaintiffs did not, nor did either of them, *one calendar month before the commencement of this suit*, deliver to the defendant, he being the party to be charged therewith, or send by the post, &c. a signed bill, as by the statute in such case made and provided is required.—Verification.

Special demurrer on the ground, inter alia, that the statement in the plea, that no signed bill was delivered &c. one calendar month before the commencement of this suit, was insufficient, instead of stating, in the words of the statute, that this suit was commenced before the expiration of one calendar month after such signed bill had been so delivered, &c. Joinder in demurrer.

The defendant's points for argument stated, that the defendant would contend that the declaration was bad on the following grounds (inter alia):—First, that the declaration did not state any sufficient consideration for the defendant's promise; secondly, that the agreement was void, as being illegal; thirdly, that it did not appear that the plaintiffs had released the defendant from the residue of their claim against him; and fourthly, that if the declaration was good, the plea was a good answer to it.

Maynard appeared in support of the demurrer to the

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plea, but was requested by the Court in the first instance to defend the declaration.—The declaration is good. It is framed in accordance with a suggestion thrown out by Lord Abinger, C. B., in *Edwards v. Baugh* (α). In that case the declaration merely stated that disputes and controversies were pending between the plaintiff and defendant, whether the defendant was indebted to the plaintiff in a certain sum, and Lord Abinger, C. B., said: “The case might have been different if the declaration had said, ‘whereas the defendant was indebted to the plaintiff in divers sums of money, for money lent and also on an account stated;’ that a dispute arose as to the *amount* of the debt so due; and in order to put an end to all controversies respecting it, it was agreed that the plaintiff, in consideration of receiving 100*l.*, should not sue the defendant in respect of his original claim. In that case the plaintiff would have been bound to prove at the trial the existence of a debt to some amount; he might not indeed be bound to prove the full amount, but simply to shew such a claim as to lay a reasonable ground for the defendant’s making the promise; whereas, in the present case, he would not have to prove anything beyond the fact that there had been a dispute between himself and the defendant as to the existence of a debt.” It will be contended, that the declaration discloses a mere accord executory, and therefore does

tled accounts between the plaintiff and the defendant, and that there were disputes touching the said accounts, and that the plaintiff claimed of the defendant that he was indebted to him in a large sum of money, and that the defendant claimed of the plaintiff that the plaintiff was indebted to him in a large sum, and that it was agreed that each party should withdraw his claim, and that the defendant should pay the plaintiff a certain sum by way of annuity; and that, in consideration that the plaintiff would withdraw his claim, the defendant promised the plaintiff to pay him the annuity; and the declaration was held good. *Patteson*, J., there says: "Here is a plain detriment to the plaintiff in foregoing his claim to the balance, a claim which was not made against a stranger, but which had a probable foundation arising from mutual accounts between the parties, which are admitted to have been open and unsettled." [*Parke*, B.—There were cross claims in that case. Here nothing is stated but a mere agreement to settle an unliquidated debt.] The parties have entered into an arrangement, by which the plaintiff has agreed to give up the balance of a bonâ fide claim of uncertain amount, in consideration of the defendant agreeing to pay a definite amount. That is a sufficient consideration for the defendant's promise. The original debt was satisfied by the new agreement. The Statute of Limitations would run from that time, for the plaintiff gains a new cause of action. [*Pollock*, C. B.—Could the defendant have pleaded the new agreement in bar to an action upon the old debt?] He might if he were to pay the sum of 150*l.* into Court. The following cases bear upon this point:—*Smyth v. Holmes* (a), *Cooper v. Phillips* (b), *Young v. Walker* (c), *Evans v. Powis* (d); and the notes to *Cumber v. Wane*, 1 Smith's L. C. 146. [*Pollock*, C. B.—Is an agreement not to tax an at-

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(a) 10 Jur. 862.

(b) 1 Cr. M. & R. 649.

(c) 16 M. & W. 446.

(d) 1 Exch. 601.

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torney's bill legal, and binding upon the parties?] It is submitted that it is. The statute was passed for the protection of such parties as are willing to avail themselves of its provisions.

Secondly. The plea is bad in form. The 6 & 7 Vict. c. 73, s. 37, enacts, that no attorney shall commence or maintain an action for the recovery of his fees until the expiration of one month after the delivery of his bill: *Parker v. Gill* (a) is in point. The plea should have stated that the action was commenced before the expiration of one month after the delivery of the bill. The present allegation is immaterial: *Blunt v. Haslop* (b) is also in the plaintiffs' favour.

Willes contra.—The declaration is bad. It merely sets up an accord executory: *Hopkins v. Logan* (c), *Flockton v. Hall* (d), *Henderson v. Stobart* (e). [*Parke*, B.—The declaration at the best amounts only to a special count on an account stated.] If that be the opinion of the Court as to the declaration, the defendant relies upon the plea, which is in the usual form, and is good: *Scadding v. Eyles* (f), *Eicke v. Nokes* (g). *Parker v. Gill* (a) merely decided that in a plea the word month means lunar month, and therefore that a plea which omitted the word "calendar" before the word month was bad. He was then stop-

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COATES & Another v. WILLIAMS.

Jan. 24.

THIS was an issue under an interpleader order, in which the question was, whether certain goods and chattels at the time of the writ of execution being lodged with the Sheriff, were the property of the plaintiffs.

At the trial, before *Martin*, B., at the London Sittings, in the present Term, the following facts appeared:—In July, 1851, one George Stephens, the defendant in an action of *Williams v. Stephens*, being in difficulties, apprised one of the plaintiffs of his situation, and afterwards, at the suggestion of his own solicitor, executed to the plaintiffs, who were his largest creditors, a deed of assignment of his stock in trade and effects for the benefit of his creditors.

By this deed, which was executed previously to the defendant's (*Williams*'s) execution, and was in the usual form, Stephens assigned his stock in trade, and all other his estate, effects, &c., in trust, to sell the same, and out of the proceeds to pay rateably, and without preference, such creditors as should execute the deed. The deed then contained a proviso, that creditors not signing within three months should be excluded from the benefit of the assignment; that the trustees might make to the said G. Stephens such allowance, or return to him such part of his household furniture or effects not exceeding the value of 20*l.* as they "might deem expedient, and also might employ the debtor, or any other person or persons, in winding up the affairs of him the said George Stephens, and in collecting and getting in his estate and effects hereby assigned, and in carrying on his trade if thought expedient by them; and to allow to the said George Stephens, or any other person or persons so employed as aforesaid, out of the said trust estate, such sum and sums as to the said trustees shall seem proper."


Seemle, that an assignment by deed to a trustee, for the benefit of creditors, which empowers the trustee to employ the debtor or other person "in winding up his affairs and collecting and getting in his estate, and carrying on his trade," is not void as against creditors, if it appears upon the instrument that the main object of the parties to it was to wind up the debtor's business for the benefit of the creditors, and not to carry on the business with a view to future profits.

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On the part of the defendant it was contended, that the clause in the deed by which the trustees were empowered to carry on the business to the exclusion of those creditors who did not execute it, rendered it void as against the latter: *Owen v. Body* (a). The learned Judge, however, said, that the deed was in the common form, and might be purchased in a stereotyped form at almost any stationer's shop; and that the case of *Owen v. Body* was distinguishable, on the ground that there one of the objects of the deed was to enable the creditors who executed the deed to carry on the business with a view to future profits; and that, if the jury should be of opinion that the deed was a bonâ fide transaction, he should direct a verdict to be entered for the plaintiffs. The jury having found in the affirmative, a verdict was entered for the plaintiffs, with 16*l.* damages.

In the present Term (January 16)—

Crowder moved on the ground of misdirection; and contended that the deed was void, upon the authority of *Owen v. Body*. [*Parke, B.*—That case has been qualified by a recent decision of the Court of Common Pleas, in *Janes v. Whitbread* (b), where it was held that a deed of assignment, by which trustees were empowered to carry on the debtor's



or bill of exceptions and a writ of error could be considered as a fit subject for litigation, the Court would grant a rule. But as this is an interpleader issue, it does not admit of a bill of exceptions. If it were an action, the Court would probably grant a rule for a new trial, unless the plaintiff would consent that the defendant should be in a situation to tender a bill of exceptions. But the amount in dispute is very small, and there is a decision of the Court of Common Pleas, viz., *Janes v. Whitbread*, in point, for the deed there was in precisely the same terms as the present one, and, as my Brother *Martin* observed, "a stereotyped deed to be had at any law-stationer's in London." Under these circumstances, and as a Court of co-ordinate jurisdiction has pronounced its judgment on the effect of a similar instrument, and as the ruling of the learned Judge at Nisi Prius is in conformity with that decision, we are of opinion that there ought to be no rule.

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Rule refused.

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Jan. 31. STRICKLAND v. SARAH TURNER, Executrix of E. H. LANE.

E. H. L., who resided at Sydney, New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to certain trustees, to dispose of it for his benefit. The plaintiff entered into a correspondence by letter with the trustees, upon the subject of the purchase, and from the various letters which passed between the parties, it appeared that the terms of the purchase were not finally determined upon and settled until the 28th of February, 1849. Upon the 6th of that month the annuitant died.

ASSUMPSIT for money had and received by the defendant, as executrix of Edward Henry Lane, deceased.—Plea, non-assumpsit, and issue thereon.

By mutual consent and by a Judge's order, a case, of which the following are the material facts, was stated for the opinion of this Court.

The action was brought to recover the sum of 973*l.* 11*s.* under the following circumstances:—Edward Henry Lane, of Sydney, New South Wales (the testator), was entitled for his life to an annuity of 100*l.* per annum, payable half-yearly, on the 30th of March and the 30th of September, bequeathed to him under the will of a Mrs. Way.

The plaintiff was one of the executors, and the residuary legatee, of Mrs. Way.

On the 4th of June, 1847, Mr. Lane, then residing at Sydney, transferred the annuity by deed to Arthur Daintrey and Adrian Daintrey, who resided in England, to dispose of as his trustees and for his benefit.

In November, 1847, a correspondence was entered into between the Messrs. Daintrey and a Mr. Cookney, the attorney and agent of the plaintiff, upon the subject of the

“ 21st December, 1848.

“ Dear Sir,—I fear if you can get a purchaser for much, if anything, beyond 1000*l.* after April next (as at that time another half-year’s annuity will be due less a year’s duty), that Mr. Strickland will decline treating for it. My view is, that a purchaser ought to buy the annuity to pay 6 per cent. at least, and to insure the life would cost nearly 3 per cent., and that would be 9 per cent. for the purchase money. This would make the outside value 1100*l.*, 11 times 9 being 99, and the expense of purchase would far exceed another 1*l.* per annum. Supposing Mr. Lane to be dead when you sell, how do you propose securing the purchaser against this contingency? for, unless the insurance office would undertake to pay the money, a purchaser cannot be advised to part with his. Most probably you have considered these matters, and will favour me with your sentiments thereon.

“ I am, &c.

“ A. Daintrey, Esq.

“ J. T. COOKNEY.”

“ December 22nd, 1848.

“ Dear Sir,—Assuming that Mr. Strickland will purchase, I am in a condition immediately to convey, as I have a discretion to sell as low as 1000*l.* I will do so if Mr. Strickland will agree to purchase at that sum. This agreement to purchase would of course be conditional on my shewing a good title to convey. My brother is in practice as a solicitor in Sydney, and he is concerned for Mr. Lane, who, when I last heard from my brother a short time since, was as well as ever.

“ J. T. Cookney, Esq.

“ A. DAINTRY.”

After a few other letters, the following letters passed between the same parties:—

“ 26th January, 1849.

“ Dear Sir,—I have heard from Mr. Strickland, and although his full object will not be accomplished, he is willing to give 1000*l.* for the annuity; and looking, as you

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say, to the loose mode of the bequest, I think the offer a liberal one. If accepted, then the only point to be considered is, how the sale is to be completed in the absence of proof of Mr. Lane being alive.

"Yours, &c.

"J. T. COOKNEY."

"27th January, 1849.

"Dear Sir,—I accept Mr. Strickland's offer of 1000*l.* for this annuity on the following conditions:—1st, That he take an assignment of the annuity from myself and my brother Adrian, under the assignment to us, a copy of which I inclose. 2ndly, That the purchase be completed within one month from this day. 3rdly, That Mr. Lane be at no expense about shewing a title to the annuity, and that no deductions be made on account of legacy-duty remaining unpaid. 4thly, That the annuity, or a proportion of it, be paid up to the day of completion. Probably the signature of Mr. Lane to the original assignment may be known to yourself or Mr. Strickland.

* * * * *

"If the conditions are acceded to, I will come to town and settle as soon as you are prepared. My brother Adrian is resident there. I shall be much obliged by dispatch. Proof of Mr. Lane's being alive will not of course be at all

in that case my client will be content to take 5*l.* per cent. upon his purchase money to the 30th of April (*a*), and give credit for the annuity, subject to the deduction for legacy duty, thus:—

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	£	s.	d.
Say Purchase Money	1000	0	0
Half Year's Annuity to 30th April	50	0	0
	<hr/>		
	1050	0	0
A Year's Interest on 18 <i>l.</i> 2 <i>s.</i> 4 <i>d.</i> Fourth Year's Duty	0	18	0
	<hr/>		
	1050	18	0
Deduct 3rd Year's Duty	18	2	4
4th ditto	18	2	4
2 Months' Interest from 28th of Feb- ruary to 30th of April on 1000 <i>l.</i>	8	6	8
	<hr/>		
	44	11	4
	<hr/>		
	£1006	6	8
	<hr/>		

“If you are content with this arrangement I will proceed to raise the money, and let you have the draft assignment in a few days.

“I am, &c.

“J. T. COOKNEY.”

“1st February, 1849.

“Dear Sir,—If your letter of 31st of January is to be read in connexion with that of the 21st of December, the latter certainly favours the offer I have made; for it informs me that Mr. Strickland would not give more than 1000*l.* after April, when of course the instalment of annuity and duty would have been paid. I am sure that upon reference to this letter you will see that this is the fair construction of it, and I think, therefore, that the conditions of my last letter ought to be acceded to.

“I am, &c.,

“A. DAINTRY.”

“3rd February, 1849.

“Dear Sir,—I only referred you to my letter of the 21st of December, as evidence of what I thought the value of

(*a*) Sic.

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an annuity of 100*l.*, and that it was the object in view. Mr. Strickland does not, and did not, entertain my views, but considers the offer made in my last letter very fair and liberal.

"Mr. S. will be glad to know if the offer will be accepted, and particularly if the money is to be paid this month."

"Yours, &c.,

"J. T. COOKNEY."

"5th February, 1849

"Dear Sir,—If Mr. Strickland will not give more than you say, *I must accept the offer*. I assume of course that the last half year's annuity has been paid. I should like to have the draft assignment as soon as possible, and to complete with all despatch, as Sir C. F.'s son is going out in about ten days, and will take charge of my letters to my Brother.

"I am, &c.,

"A. DAINTRY."

"19th February, 1849.

"Dear Sir,—I have been expecting the draft assignment as promised in a few days by your letter of the 31st ult. I hope to receive it without delay.

"I am, &c.,

"A. DAINTRY."

"23rd February, 1849.

"Dear Sir,—I return you draft approved, with some slight alterations. I propose to settle at your office on Wednesday the 28th inst. at 10 o'clock, unless I hear from you to the contrary by return, and have made an appointment with my brother to that effect. I dare say you will favour me with a line by return at all events.

"I am, &c.,

"A. DAINTREY."

"24th February, 1849.

"Dear Sir,—I conclude the assignment to you is stamped; if not, you will of course get it done. The time you mention will suit very well. "Yours truly,

"J. T. COOKNEY."

"25th February, 1849.

"Dear Sir,—The assignment to myself and brother is not stamped, nor I believe is a stamp necessary, &c. Be pleased to let me hear from you by return, and let me have the engrossment here by return, or at &c., on Tuesday evening by seven o'clock. My brother will attend there to execute, and it is probable he will be obliged to leave London on Wednesday morning.

"I am, &c.

"A. DAINTREY."

"26th February, 1849.

"Dear Sir,—I am sorry to differ with you about the stamp duty. I am quite satisfied you could not compel a purchaser to take to the title without a 35s. on the assignment to you, and the Office would stamp it. I should like to see the deed of assignment to you which my clerk can do when he attends at &c. to-morrow, to see your brother execute the proposed deed of sale to Mr. Strickland.

"I am yours truly,

"J. T. COOKNEY."

By indenture, bearing date the 28th of February, 1849, and then made between the said Arthur and Adrian

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Daintrey of the one part, and the plaintiff of the other part, after reciting that the said E. H. Lane was entitled to the said annuity, &c., for his life, and also reciting (inter alia) the said assignment of the 4th of June, 1847; and that the plaintiff, as such residuary legatee as aforesaid, had duly paid the said annuity for the use of the said E. H. Lane up to the 30th day of March next; and also reciting the said indenture of the 4th day of June, 1847, and that the said Messrs. Daintrey had contracted with the plaintiff for the absolute sale, &c., to him of the said annuity, and all growing and future payments thereof, for the price of 973*l*. 11*s*., it was witnessed that, in pursuance of the said contract, and in consideration of the sum of 973*l*. 11*s*., the said Messrs. Daintrey did grant, bargain, sell, &c., unto the plaintiff, his heirs, &c., all the said annuity or sum of 100*l*., and all growing and future payments thereof, To have and to hold the said annuity unto the plaintiff, his heirs, &c., from henceforth during all the residue of the life of the said E. H. Lane, to the end and intent that the plaintiff, his heirs, &c., might be entitled to receive and retain the same for his and their own use and benefit.

The consideration money, amounting (exclusively of the arrears of the said annuity) to 973*l*. 11*s*., was paid on behalf of plaintiff to the said Arthur Daintrey. And the following receipt was then signed by the said Arthur



The transaction was perfectly bonâ fide.

It was subsequently ascertained, that the said E. H. Lane died at Sydney on the 6th of February, 1849, having previously made his will, and having appointed the defendant sole executrix thereof. The said sum of 973*l.* 11*s.* 0*d.* was paid by the said Arthur Daintrey into the Bank of Australasia, to the account of the said E. H. Lane, before the news of his death reached this country. It was admitted, that the same was, with the plaintiff's concurrence, received by the defendant as executrix of the said E. H. Lane after his death, subject to be refunded to the plaintiff, if, under the circumstances, the plaintiff should be so entitled.

The Court were to be at liberty to draw any such inference from the facts of the case as a jury would be warranted in drawing.

The question for the opinion of the Court was, whether, under the foregoing circumstances, the plaintiff was entitled to recover from the defendant as executrix of E. H. Lane the said sum of 973*l.* 11*s.* so paid; and judgment was to be entered in accordance with the opinion of the Court.

Crowder (*Raymond* with him) for the plaintiff.—The plaintiff is entitled to recover the money he has paid, on the ground that there is an entire absence of consideration for the payment. This is a contract for the sale of an annuity; and at the time it was sold, it had ceased to exist. The annuitant died on the 6th of February, but there was no contract for the sale until long after that day, for the contract was completed on the 28th of February, by the deed which was then executed. [*Martin*, B.—If a chattel is sold, and at the time of the sale the chattel does not exist, the contract is not binding upon the purchaser: *Barr v. Gibson* (a).] And therefore, unless the defendant can establish the proposition, that the contract for the sale

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(a) 3 M. & W. 390.

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was complete *before* the 6th of February, the plaintiff's claim at law to the return of the money is unanswerable.

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Bramwell (Rex with him) for the defendant.—The correspondence shews, that it was the intention of the parties that the sale of the annuity should be complete on the 5th of February. It was not a mere agreement for a sale. The execution of an instrument under seal is not essential to the validity of the transfer. The letters, therefore, do not amount to a contract for a future sale, to be embodied in the deed, but they contain the terms of the contract itself, by which contract the whole of the vendor's interest in the annuity passed on the 5th of February. In 1 Sugd. on Vend. and Purch., 11th ed., 330, it is said, "A vendee, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the date of the agreement and the conveyance; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim." And again, at page 334 it is laid down, that "it equally follows, from the general rule of equity, by which that which is agreed to be done is considered as actually performed, that if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the conveyance is execut

Tarling v. Baxter (a), *Rugg v. Minett* (b); or, at all events, it was a sale of the vendor's interest at that time. The deed operates as a mere authentication of the transfer; and moreover, it recites a past contract.

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Crowder, in reply, contended that there was no contract on the 5th of February; that the deed spoke of the conveyance of the annuity as being "from thenceforth;" and, consequently, that the plaintiff had never received any consideration for his money.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—The question in this case, which the Court took time to consider, lies in a very narrow compass. The plaintiff brought his action against the defendant to recover back money paid by him for the purchase of an annuity bequeathed to Edward Henry Lane, of Sydney, New South Wales, by the will of Mrs. Elizabeth Way. That annuity had been assigned by Edward Henry Lane, who was still residing in Sydney, to Arthur Daintrey and Adrian Daintrey, in order that they, as his trustees, might dispose of it in England for his benefit. They accordingly entered into a negotiation with the plaintiff, who was the residuary legatee under Mrs. Way's will, for the purchase of this annuity. The question between the parties is this—whether the purchase took effect during the existence of the annuity. If it did, though but for an instant, the plaintiff is not entitled to succeed; for he purchased the annuity, and cannot complain that in so doing he has made a bad bargain, as the events have turned out. But if, on the contrary, the annuity had ceased to exist before his purchase, then he has got nothing for his purchase money,

(a) 6 B. & C. 360.


(b) 11 East, 210.

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and is entitled to recover it back from the defendant, the executrix of Lane, who has received it from the trustees.

The question therefore is, what was the bargain, and when did it take effect. If the annuity was sold upon the 5th of February, 1849, by the acceptance contained in the letter of that date, the subsequent death of the annuitant at Sydney on the 6th of February, 1849, will defeat the plaintiff's claim. If, on the other hand, the agreement was for a future sale, to be effected by assignment of the annuity, which took place on the 28th of February, the previous death of the annuitant will entitle the plaintiff to recover.

We must therefore examine carefully the different letters and documents, to see which of these two views of the case we ought to adopt as the fair result of the whole correspondence. There is no doubt, that, if the purchase had been completed, that is to say, if there had been an agreement that from and after the 5th of February, 1849, the annuity was to belong to Mr. Strickland, and the money given for it to belong to the trustees, the subsequent death of Lane would make no difference. Even a bill for a specific performance could have been maintained upon such an agreement, according to the case of *Kenney v. Wezham* (a). There there was an agreement dated 18th April, 1818, for the future purchase of an annuity by the



But here in the correspondence we find no such arrangement till the assignment of the 28th of February. The offer which is stated by Mr. Strickland's agent, Mr. Cookney, in the letter of 31st January, 1849, is for the purchase of the annuity "to be completed next April, after the current half-year's annuity is paid, and the legacy duty then payable satisfied, and the future legacy duty allowed for;" and he adds, that his client will be prepared to do this on the 30th of April, unless they can agree for an earlier day of payment, and, so to speak, to discount the payment of the 30th of April on that earlier day.

It is a clear stipulation throughout the correspondence, that the annuity shall continue to be paid up to that day, whatever that might be; and until that day was fixed it is impossible to ascertain what sum of money was to be paid and received. Now this was never ascertained or settled in the life-time of the annuitant. The annuity, therefore, still continued to belong to Lane, and never, as the Vice-Chancellor says in *Kenney v. Wexham*, passed to the purchaser, till this was ascertained and the bargain finally arranged between them. When this was done, the annuity became the property of Strickland, and the money the property of the vendors. But then there was no annuity in existence. The money, therefore, which was paid, was paid wholly without consideration, and may now be recovered back from the defendant, to whom, as the executrix of Lane, it has passed. We think, therefore, that the judgment should be for the plaintiff.

Judgment for the plaintiff.

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1862.

Jan. 30. ROE, Public Officer of the BERKS UNION BANKING COMPANY, v. FULLER.

In an action by the public officer of a banking copartnership, the Court allowed a plea which denied that the copartnership were, at the commencement of the action, carrying on the trade and business of bankers, in addition to pleas of the general issue, and of accord and satisfaction.

THIS was a rule calling upon the plaintiff to shew cause why the defendant should not be at liberty in this action to plead, first, non-assumpsit; secondly, a denial that the copartnership were, at the commencement of the suit, carrying on the trade and business of bankers *modo et formá*; and thirdly, a plea of accord and satisfaction. The action was in assumpsit, and the declaration stated, that the plaintiff was one of the registered public officers for the time being of and for certain persons carrying on the trade and business of banking in England by the name, style, and title of the county of Berks Union Banking Company, and who sued as such registered public officer as aforesaid, for and on behalf of the said copartnership, under and by virtue and according to the provisions of the 7 Geo. 4, c. 46. Application had been made to *Martin, B.*, at Chambers, for the allowance of the pleas; but the learned Judge, doubting whether the second plea ought to be allowed, referred the parties to the Court.

Lush shewed cause.—In *Needham v. Law (a)*, the Court

allowed. In the case relied upon the Court did not wholly disallow the plea. That was an action *against* the public officer. In *Steward v. Dunn* (a) this plea was expressly allowed. The following cases are all in the defendant's favour—*Hughes v. Thorpe* (b), *Wilson v. Craven* (c), *Steward v. Greaves* (d), *Davidson v. Cooper* (e). [*Alderson, B.*—The last case seems to be expressly in point. *Pollock, C. B.*—It is a sufficient authority to shew that these pleas ought to be allowed.]

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 v.
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PER CURIAM (f).

Rule absolute.

(a) 11 M. & W. 63.

(e) 11 M. & W. 778.

(b) 5 M. & W. 656.

(f) *Pollock, C. B., Parke, B.,*

(c) 8 M. & W. 584.

Alderson, B., and Platt, B.

(d) 10 M. & W. 711.

ANDREWS v. EATON.

Jan. 30.

THIS was a rule calling upon the defendant to shew cause why the time for the arbitrator's making his award in this case should not be enlarged to the first day of next Michaelmas Term, or why the plaintiff should not be at liberty to sign judgment on the verdict entered for him on the trial of this cause, or why he should not be at liberty to proceed to trial in the cause unless the defendant would consent to such enlargement.


It appeared by the affidavits that, upon the cause coming on for trial, in June 1846, a verdict was entered for the plaintiff, subject to a reference to arbitration; that the reference was proceeded with on the 9th, 10th, and 15th days of December. On the 17th of June, 1848, an appointment was obtained by the defendant's attorney for proceeding with the reference; but, as it was inconvenient for some of the parties required to attend, the appointment

A cause was referred to arbitration in 1846; the parties delayed to proceed with the reference, and the arbitrator did not enlarge the time beyond Easter Term, 1850. The Court refused to enlarge the time under the 3 & 4 Will. 4, c. 42, to Michaelmas Term, 1852, the defendants refusing to accede to such enlargement.

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went off. It was stated, on the part of the defendant, that three of his principal witnesses had died since the last meeting before the arbitrator; and that, owing to that circumstance, and the advanced age of the other witnesses, the defendant would have great difficulty in proceeding with the reference. The arbitrator had not enlarged the time beyond Easter Term, 1850.

Hance shewed cause.—The plaintiff by his own default has delayed the reference, and by that delay the defence to the action is endangered. If the Court should make this rule absolute, it will do so upon terms, by imposing the payment of costs upon the plaintiff. But the Court cannot enlarge the time for making the award; for it would seem from *Lambert v. Hutchinson* (a), that where an arbitrator under an order of *Nisi Prius* has power to enlarge the time for making his award, and omits to exercise that power, the 3 & 4 Will. 4, c. 42, s. 39, does not enable the Court or a Judge to do so. *Tindal*, C. J., there says, "So long a time has elapsed since any step has been taken under the order of reference in this case, that, even if the Court has power to interfere, I do not think it would exercise a sound discretion in doing so. I have a strong opinion upon the statute, but upon that point it is unnecessary to give any opinion."



C. B.—When is that power to end? *Parke, B.*—We never interfere except in those cases where the arbitrator has by accident let slip the precise day.] The Court will make the rule absolute to sign judgment. [*Pollock, C. B.*—We will set the verdict aside, and give you leave to proceed to trial.]

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Hance then intimated, that the defendant would rather the reference should proceed, if the Court would say how the costs should be disposed of.

PER CURIAM (a).—Then the rule will be absolute for the enlargement of the time, the costs to be costs in the cause.

Rule absolute accordingly.

(a) *Pollock, C. B., Parke, B., Alderson, B., and Platt, B.*

BROMAGE and Another v. VAUGHAN, Clerk.

Jan. 30.

THIS was a rule calling upon the plaintiffs to shew cause why the writ of sequestration issued in this action should not be set aside.

It appeared by the affidavits in support of the rule, that the defendant was a vicar of two vicarages in the county of Brecon; and that, an action having been brought against him, and judgment having been signed thereon, on the 6th of August last a writ of sequestration was issued, and was put in force on the 17th of that month. At the time of the above writ so being put in force, no writ of fi. fa. had been issued to or had been returned either by the sheriff of Brecon or by any other sheriff; but on the 9th of Oc-

Judgment having been signed against the defendant, a beneficed clergyman in the county of Brecon, a writ of sequestration was issued and put in force in the month of August; but at that time no writ of fi. fa. whatever had been issued. In October, a writ of fi. fa. was issued against the defendant, to

which the sheriff of Bristol made a return of nulla bona only, and not that the defendant was clericus beneficiatus. On the 22nd of November, a rule nisi was obtained to set aside the writ of sequestration:—*Held*, first, that the writ of sequestration was irregular; and secondly, that the rule was moved for in time.

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tober a writ of *fi. fa.*, at the suit of the plaintiffs against the defendant, was returned by the London deputy for the city of Bristol *nulla bona* only, and not that the defendant was a beneficed clerk. This rule was moved and obtained on the 22nd of November last.

Willes shewed cause.—Several objections will be raised to this writ of sequestration: First, it will be said that the writ is void, because no writ of *fieri facias* with a proper return thereto had been issued and made prior to the issuing of the writ of sequestration. But this defect at the most amounts to a mere irregularity, and may be amended; 2 Chit. Arch. 1119; and the defendant, by his delay, has waived all right of taking objection to it. Secondly, it will be said that a writ of *fi. fa.* ought to have been issued into the county of Brecon, where the defendant's benefices were situated. But the writ of *fi. fa.* may be issued into any county for the purpose of obtaining a writ of sequestration; and in the present case a writ was issued, and the return by the sheriff of Bristol is sufficient. It will, however, be contended that the omission by the sheriff to make a return of *clericus beneficiatus* renders that writ of no avail; but the defect is one of form only, and is amendable; and moreover, the defendant's objection comes too late. The defendant's remedy, if he be injured by the return, may

goods of his debtor before he can avail himself of this writ. The writ of sequestration must recite the issuing of the writ of fi. fa. into the county where the defendant's benefice is situated, and that such writ has been returned nulla bona, and that the defendant is clericus beneficiatus. If that be so, this writ is void. Where a judgment has been signed more than a year, and execution is issued upon it without any sci. fa. to revive the judgment, it has been held that a writ of ca. sa. founded upon it is a nullity, or, at all events, is that kind of irregularity which cannot be waived by the acquiescence of the defendant: *Mortimer v. Piggott* (a), *Blanchenay v. Burt* (b). If the defects in this writ of sequestration be considered as amounting to a mere irregularity, the defendant's application was made in proper time. The plaintiffs have not shewn that they have received any injury by the delay.—He was then stopped by the Court.

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POLLOCK, C. B.—I am of opinion that the rule ought to be absolute. It is admitted by both sides that an irregularity exists, and the question is whether this application was made in due time. I think that it was made within a reasonable time. I do not think that there was any necessity for an application to a Judge at Chambers.

PARKE, B.—I am of the same opinion. As the writ of sequestration is admitted to be irregular, the simple question is whether the application to set it aside was made in time. If an application had been made in the first instance to a Judge at Chambers, he would most probably have stayed the proceedings, to give the parties an opportunity of coming to the Court. But the plaintiffs have not lost anything for want of such an application, for no change of circumstances has taken place between the

(a) 2 Dowl. P. C. 615.

(b) 4 Q. B. 707.

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2nd and 22nd of November. If there had been, the case might have been different.

ALDERSON, B.—It is admitted that an irregularity exists, and therefore it is unnecessary to determine what is the precise character of the irregularity, as to which there might be some doubt. At all events, I think that there is an irregularity in the sheriff not making a return of clericus beneficiatus; and it may be that it is an irregularity if no return is made by the sheriff of the county in which the clerk holds his benefice; but as to that point I entertain some doubt. It is, however, clear that there is an irregularity, and that it has not been waived by the defendant.

PLATT, B., concurred.

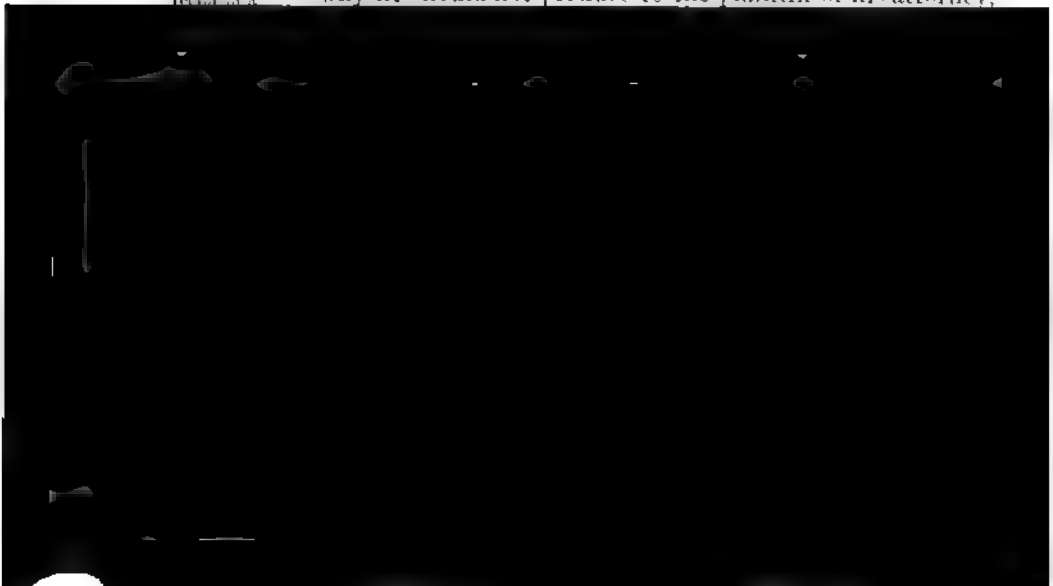
Rule absolute.

Jan. 12.

PEPPER v. CHAMBERS.

In an action
against a dis-
tress of a

THIS was a rule calling on the defendant to shew cause why he should not produce to the plaintiff or his attorney,



directors; or why the defendant should not set out upon affidavit in this cause, according to the practice of the Court of Chancery, the contents of the said several books as aforesaid.

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The plaintiff's affidavit, upon which the application was founded, stated that a Company was formed and provisionally registered by the name and title of "The Christian Mutual Assurance Society and Aged Ministers Fund," and that its title afterwards was changed to that of "The Union Mutual Life Assurance Society," and that in 1849 it was completely registered as "The Union Mutual Life Assurance and Guarantee Society;" and that the defendant was then registered as, and still is, one of the directors of the said society. The affidavit, after stating that the present action was brought to recover for services performed by the plaintiff for the said society as secretary thereto, proceeded as follows:—"And this deponent further saith, that there is, as this deponent believes, in the possession of the said Company and the directors thereof, a book or books containing minutes of the resolutions, orders, and proceedings of the directors and provisional directors of the said Company, and of the committees thereof; and this deponent is advised that it may be necessary that the said minutes, or some parts thereof, should be adduced on the trial of this action as evidence on the part of the deponent, and that without an inspection and copy thereof this deponent cannot safely proceed to the trial of this action; and this deponent further saith, that he has no copy of the said minutes in his possession or control, or any certain information as to the contents thereof or any part thereof."

An application had been made before *Martin*, B, at Chambers, but the learned Judge had refused to interfere.

Lush shewed cause.—The affidavit is insufficient. This is, in truth, a mere inquisitorial proceeding. This action

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cannot be treated as an action against the Company. It is not alleged that the contract will be established by the production of the documents required; but the deponent merely states that he is *advised* that they *may* be of use as evidence on his part. It is not stated that the documents are in the possession or control of the *defendant*.

Bartow, in support of the rule, contended that the affidavit sufficiently alleged that the action was against the Company, and that the documents were material in support of the plaintiff's case.

POLLOCK, C. B.—I think the plaintiff's affidavit clearly insufficient. If the plaintiff were to succeed upon an affidavit like the present, the papers and books of every person, either in business or out of business, would be accessible to any one who might choose to bring an action against him, and to depose that he had been *advised*—without even stating that he *believed* that advice to be well founded—that there are certain documents in the possession of the opposite party which *may* be, not which *will* be, necessary as evidence on the part of the applicant at the trial. I therefore think the rule ought to be discharged.



1852.

SNEIDER *v.* MANGINO.

Jan. '28.

THIS was an action brought by the plaintiff, a sharebroker, suing as the surviving partner of J. S., deceased, against the defendant, in respect of the purchase of stock. The particulars gave credit for several sums paid on account.

Lush now moved on the part of the defendant, under the 14 & 15 Vict. c. 99, s. 6 (a), for leave to inspect documents in the possession or under the control of the plaintiff, upon an affidavit of the defendant's attorney, which, after stating the nature of the action, and that the defendant resided in France, proceeded as follows:—"And this deponent further saith, that upon the purchase of the stock in the said particulars of demand mentioned, the plaintiff and the said J. S., deceased, received, as this deponent is informed and verily believes, divers bonds representing the security for the said stocks, as in the said particulars mentioned, which securities or some portion thereof still remain in the hands of the said plaintiff, as this deponent verily believes, but the particulars of all which said securities the plaintiff and his said partner, although requested by the defendant so to do before the commencement of this action, have wholly neglected to furnish to the defendant or any person on his behalf; and this deponent is informed and verily believes, that in addition to the said bonds there exist divers books, papers, writings, entries,

In an action by a sharebroker in respect of the purchase of stock, in which the bill of particulars allowed several credits, the defendant applied, under the 14 & 15 Vict. c. 99, s. 6, for leave to inspect the books, documents, &c., in the possession of the plaintiff, upon an affidavit of his attorney, which stated that, upon the purchase of the stock, the plaintiff received, as the deponent was informed and verily believed, divers bonds representing the security for the said stock, which securities remained in the hands of the plaintiff, the particulars of which he neglected to furnish to the defendant, &c., and also divers books, papers, writings, en-

tries, accounts, and other documents in relation to the said stock, &c., and that it was material and necessary, in order to enable the defendant to defend the action and to arrive at a just and proper conclusion as to the state of the accounts between him and the plaintiff, that the deponent or the defendant should inspect and take copies of all such bonds, books, &c., which the deponent verily believed were in the possession or under the control of the plaintiff; that the plaintiff had delivered to the defendant two accounts relating to the matters in question; and that the deponent verily believed that neither the particulars of demand nor those accounts set forth the true state of the accounts between the parties, &c.; and that the application was made *bonâ fide*, &c.:—*Held*, that no ground was shewn for an order to inspect under the statute.

(a) See post, p. 241.

1882.
SMITH
v.
MANGINO.

accounts, and other documents in relation to the said stock, matters, and things, mentioned in the said particulars, and in the two accounts hereinafter mentioned; and that it is material and necessary, in order to enable the said defendant to defend this action, and to arrive at a just and proper conclusion as to the state of the accounts between the plaintiff and the defendant, that he this deponent, or the said defendant, should be permitted to inspect and take copies of all such bonds, books, papers, writings, entries, accounts, and other documents relating to the said stock, matters, and things aforesaid. And this deponent further says, he verily believes that such bonds, books, papers, writings, entries, accounts, and other documents are in the possession or under the control of the said plaintiff, who, at or about the times mentioned in the two several accounts also hereunto annexed, marked respectively B. and C., delivered, or caused to be delivered, copies of the same to the said defendant, and which said last-mentioned accounts respectively relate to the matters in question in this action. And this deponent further says, he verily believes that neither the said particulars of demand, nor the said accounts, set forth the true state of the accounts between the parties to this action, or of the dealing of the plaintiff and his said partner with regard to the said stock, and that such would appear to be the case upon

spect documents to see whether a case is made out against you.] But where the documents may negative the case of a party's adversary, an inspection may be granted, and is not confined to such as make out his own case affirmatively. The books are held by the plaintiff as trustee, being a sharebroker, and bound to enter duly all purchases in them. [*Parke, B.*—Then the defendant may be entitled to inspection at common law. But why should the bonds be inspected?] The plaintiff's claim is believed to be exorbitant, and the object of the statute is to enable the defendant to ascertain the nature of the demand against him. In *Bluck v. Gompertz (a)*, inspection of a guarantee was granted.

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PABKE, B.—That was under the common-law authority of the Court, independently of the statute. This affidavit is certainly too vague.

ALDERSON, B.—The affidavit does not state that the bonds would shew any defence to the action.

. POLLOCK, C. B., concurred.

Rule refused.

(a) Ante, p. 67.

1852.

Jan. 31.

HILL v. PHILP.

In an action against the keeper of a lunatic asylum, licensed under the 8 & 9 Vict. c. 100, for improper treatment of the plaintiff whilst confined there as a lunatic, the defendant is not privileged from producing the books required by that statute to be kept; and therefore an order was made under the 14 & 15 Vict. c. 99, s. 6, for the plaintiff to inspect "The Book of Admissions, The Book of Entries, The Medical Visitation Book, The Case Book, and The Patients' Book," so far as related to the plaintiff. The Court also

THIS was an action against the keeper of a private lunatic asylum, licensed under the 8 & 9 Vict. c. 100, for alleged improper and unskilful treatment of the plaintiff whilst confined there as a lunatic. The defendant pleaded the general issue, by statute. An order had been made by *Martin*, B., at Chambers, that the plaintiff be at liberty to inspect the following documents, namely, "The Book of Admissions" (8 & 9 Vict. c. 100, s. 50), "The Book Containing Entries of Removal or Discharge of the Plaintiff" (sect. 54), "The Medical Visitation Book" (sect. 59), "The Case Book" (sect. 60), "The Visitors' Book" (sect. 66), "The Patients' Book" (sect. 66), the License or Licenses under which the defendant kept the asylum, and the Order and Medical Certificates under which the plaintiff was confined as a lunatic in the defendant's asylum; also all letters written or sent by the plaintiff's wife to the defendant, and all letters written or sent by the Commissioners of Lunacy to the defendant relating to the plaintiff. The order directed that the inspection be carried on before the Master, who was to seal up uninspected all parts of the above-mentioned books not relating to the

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frequently prompt them to make the most unfounded charges against individuals.—Secondly, these documents are of a strictly private and confidential nature. The 6th section of the 8 & 9 Vict. c. 100, requires the Commissioners to take an oath in these terms:—"I will keep secret all such matters as shall come to my knowledge in the execution of my office (except when required to divulge the same by legal authority, or so far as I shall feel myself called upon to do so, for the better execution of the duty imposed on me by the said Act." By sections 12 and 22, a similar oath, with the exception of the last paragraph, is required to be taken by the secretary or clerk and the assistant clerk to the visitors.—Thirdly, it does not appear in what way these documents are material in support of the plaintiff's case. In equity the right of discovery is confined to such documents as relate to the plaintiff's case, and does not extend to evidence by which the defendant's case is to be established: *Bolton v. The Corporation of Liverpool* (a). That principle was adopted in *Rayner v. Allhusen* (b), where it was held, that a party had no right to the production of his opponent's books for the mere purpose of searching them, with a view to discover something favourable to his case.

Cause was to have been shewn in the first instance; but the Court having intimated that a rule ought to be granted,

James shewed cause (Jan. 29th).—The order is correct. All the documents are clearly relevant to the questions in the cause, as shewing the condition of the plaintiff, and how he was treated by the defendant whilst in his asylum. The books sought to be inspected are public documents, and the entries in them are evidence affecting the defendant with notice of the facts stated. It is argued that their

(a) 1 My. & K. 88.

(b) 15 Jur. 1060.

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contents ought not to be divulged, on grounds of public policy; but that argument would equally avail against a public investigation under a commission of lunacy. The very object of requiring these books to be kept is to guard against the improper treatment of lunatics in secret. There is nothing in the statute to deprive a patient, who complains of the misconduct of the keeper of an asylum, of the most important and perhaps the only evidence derivable from the entries of the defendant himself. The oath of secrecy is relied on, but that contains the clause "except when required to divulge the same by legal authority;" and it might as well be argued that this oath would protect the Commissioners from examination even in an action against themselves. Reports of Commissioners in Lunacy, founded on information acquired from these books, are published periodically; and in the present case the privilege, if any exists, has been already violated by disclosure to the defendant's attorney. The letters and other documents are also relevant and material to the plaintiff's case. [*Alderson, B.*—The license is important, to shew that the defendant is keeper of a licensed house under the statute; the order for admission shews that the plaintiff was received there as a patient; and the medical certificate is notice to the defendant as to the mode in which the plaintiff was to be treated.] *Bolton v. The Corporation of Liver-*

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nurse, attendant, servant, or other person employed in any licensed house &c., shall in any way abuse or ill treat any patient confined therein, or shall wilfully neglect any such patient, he shall be deemed guilty of a misdemeanor" &c.; and the Home Secretary is empowered, on the report of the Commissioners, to direct the Attorney-General to prosecute "any person who shall have been concerned in the neglect or ill-treatment of any patient or person so confined." Now the books in question, if produced, might subject the defendant to an indictment for a misdemeanor. [*Parke, B.*—It is not necessary, in order to support the declaration, that there should have been a wilful neglect; the mere omission of ordinary care and skill is sufficient. The 56th section is explained by the 106th. If the declaration could only be supported by proof of wilful neglect, there would be much force in the argument; but we cannot consider it as imputing a criminal charge, unless an affidavit be made to that effect.] At all events, if an inspection be allowed, the costs of it ought to be paid by the plaintiff. The rule in equity is, that the costs of a discovery must be paid by the party seeking it; and as this application is a substitute for a bill of discovery, the same rule ought to apply.

PER CURIAM.—The rule ought to be discharged, as the order was right; but with respect to the question of costs, we will take time to consider, and lay down some general rule.

Cur. adv. vult.

POLLOCK, C. B., now said—We are of opinion that the costs of inspection, under the 14 & 15 Vict. c. 99, s. 6 (a), should always be paid by the party seeking the inspection: such costs being in general very trifling indeed. The costs of the present rule to be the plaintiff's costs in the cause.

Rule accordingly.

(a) See post, p. 241.

1858.

June 3.

HUNT v. HEWITT (a).

The 14 & 15 Vict. c. 99, s. 6, has not given to Courts of common law the power of compelling a discovery, but only of allowing an inspection of documents, subject to the following limitations: First, there must be an action or other proceeding pending; secondly, the documents must relate to such action or other proceeding; and thirdly, the case must be one in which a discovery could be obtained in a Court of equity.

Where an inspection is litigated and the facts disputed, the application must be supported by an affidavit, shewing that an action or other proceeding is pending, and stating circumstances sufficient to establish, *prima facie*, that the opposite party has in his possession or under his control documents relating to such action or other proceeding, and that the applicant would by bill or other proceeding in equity obtain a discovery and inspection of the documents.

The right of a plaintiff in equity is limited to a discovery confined to a question in the cause, and to such material documents as relate to the proof of the plaintiff's case on the trial; and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. Therefore, under the 14 & 15 Vict. c. 99, s. 6, the

THIS was a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to inspect the day-book or journal of the plaintiff, so far as related to this action, and to take an examined copy thereof. An application had been made to *Platt*, B., at Chambers, for liberty "to inspect all documents in the custody or under the control of the plaintiff relating to this action, more especially of the plaintiff's day-book or journal, and of any book or books in the plaintiff's possession or custody, containing any entry of business done by the plaintiff for the defendant or his nephew, Arthur Hewitt, (and other persons named); and also of all plans in his possession or custody of any houses, drains, roads, carcasses, or other portions of the defendant's estate called The Wandsworth-road Estate, in respect of the alleged surveying and superintending the

erection and formation of which the action was brought." The affidavit in support of that application merely stated, that the documents, if produced, would furnish material evidence in support of the defendant's case, and that an inspection was necessary and material to the defence of the action. The learned Judge made an order for the inspection of the plans only. The present rule was thereupon obtained, on the following affidavit of the defendant's nephew, Arthur Hewitt, who was his attorney in the action:—
"That this action was brought by the plaintiff against the defendant to recover the sum of 254*l.*, alleged by the plaintiff to be due to him from the defendant, for superintending the erection of certain premises on a certain estate of the defendant's, situate in the Wandsworth-road, in the county of Surrey, and the formation and laying out of certain roads and drains on the said estate, between the months of August 1850, and March 1851. That the plaintiff never had any communication with the defendant till after the commencement of this action, and he never was employed by the defendant himself; but that all orders received by the plaintiff were given by this deponent, and not otherwise. That he has reason to suspect, and verily believes, that the plaintiff never did any portion of the work sought to be charged for in this action; and, moreover, that the plaintiff never did give credit to the defendant, but hath always given credit to this deponent alone. That the sum charged by the plaintiff would be unreasonable and excessive for the work done by the plaintiff, if any work was actually done. That the plaintiff keeps books of account of all work done by him; and this deponent verily believes, that among other books the plaintiff keeps a journal or day-book, containing his account of all work done by him. That he verily believes, and counsel has so advised this deponent, that for the purpose of defending this action, and in order to ascertain whether the plaintiff did any portion of the work charged for, and whether the plaintiff ever did give credit

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to the defendant, and also in order to ascertain whether the price charged by the plaintiff be or be not unreasonable and excessive for the work (if any) actually done by the plaintiff, it is very important and necessary to obtain an inspection of so much of the plaintiff's day-book or journal kept by the plaintiff, as contains entries of or relating to all business done or purporting to have been done by him and his clerks, or others by his direction, between the 9th of August 1850, and the 12th of April 1851, in and about the alleged superintending the erection of the said houses, and the alleged formation and laying out of the said roads and drains. That the said day-book or journal is in the custody or under the control of the plaintiff, and that the said entries, &c. relate to this action; and that, until after such inspection of them has been had, the defendant cannot properly prepare his pleas to the declaration in this cause. That he verily believes that such day-book or journal will, if produced, furnish material evidence in support of the defendant's case in answer to the claim of the plaintiff, and will enable the defendant to establish a sufficient answer to the case of the plaintiff; and that the inspection of such day-book or journal is necessary and material to the defence of this action on part of the defendant's case; and in

tomers, and also contains memoranda relating to the general business of the deponent; and that it would be very difficult to separate the items, so as to prevent the person inspecting the book from prying into the general affairs of the deponent; that such diary would not furnish material evidence in support of the defendant's case, nor enable the defendant to establish an answer, nor shew that the deponent never did the work charged for, nor that the deponent never gave credit to the defendant, nor that the claim is unreasonable and excessive; that the deponent never gave credit to Arthur Hewitt for the work done, but always gave credit to the defendant.—The affidavit also set out the particulars of demand, from which it appeared that the amount in question was a per-centage claimed by the plaintiff for commission as an architect and surveyor.

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Lush shewed cause (January 31).—The defendant has not laid sufficient ground to entitle him to inspect the plaintiff's day-book. The affidavit merely states, in effect, that the deponent believes that there are entries in the plaintiff's books which may probably assist the defendant in his defence. There is no statement that the deponent did not direct the plaintiff to debit the defendant, and it is consistent with this affidavit, that the defendant authorised the deponent to pledge his credit, and he accordingly did so. On the other hand, the plaintiff deposes that he was employed by the attorney, who makes the affidavit, as the agent of the defendant; and that he never gave credit to the attorney. The object of this application is to discover some evidence that the work was done, not on the credit of the defendant, but of some other person.—He referred to Story on Equity Jurisprudence, sect. 327.

Honyman in support of the rule.—The deponent cannot swear positively as to the contents of a book which he

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has never seen; and therefore it is enough to state his belief that the book, if produced, would shew that the work was not done. It is different in equity, where it is competent for a plaintiff to make any statement in his bill of discovery. [*Alderson*, B.—In the case of *Bolton v. The Corporation of Liverpool* (a), the principle is thus stated by Lord *Brougham*, C.—“A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary’s. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. Thus, an heir-at-law cannot, in that character, call for the general inspection of deeds in the possession of a devisee.”] The book sought to be inspected is not evidence for the plaintiff. The affidavit on behalf of the defendant states, first, that the work was not done; secondly, that, if done, it was not on the credit of the defendant; and, thirdly, that the charges are unreasonable. [*Parke*, B.—The defendant might have had a right to inspection if the attorney had sworn that he ordered the work on the credit of some person other than the defendant. *Alderson*, B.—The affidavit only states, that the deponent “has reason to suspect that the plaintiff never gave

their production: *Smith v. The Duke of Beaufort* (a), *Attorney-General v. The Corporation of London* (b), Pollock on Inspection of Documents, p. 51.

Cur. adv. vult.

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The judgment of the Court was, in the following Trinity Term (June 3), delivered by

POLLOCK, C. B.—In this case an application was made to the Court to compel the plaintiff to allow an inspection of a day-book or journal kept by him. An application had previously been made, of a more extensive nature, to my Brother *Platt*, at Chambers. It was a summons to inspect *all* documents in the custody or under the control of the plaintiff relating to the action, particularly the day-book or journal, &c. [His Lordship stated the summons.] This summons was supported by an affidavit laying no sufficient grounds for an inspection of all the documents. My Brother *Platt* made an order to inspect certain plans only. An application was then made to the Court, on an amended affidavit, for an inspection of the day-book and journal, and a rule nisi granted. It was heard before us in the course of Hilary Term, and we took time to consider, not so much on account of any difficulty in the present case, as on account of the importance of the practice under the 14 & 15 Vict. c. 99, s. 6, upon which it is extremely desirable to lay down some rules.

The section is in these words(c): [His Lordship read the

(a) 1 Hare, 507.

(b) 12 Beav. 8.


(c) Sect. 6. "Whenever any action or other legal proceedings shall henceforth be pending in any of the superior Courts of common law at Westminster or Dublin, or the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county

of Durham, such Court and each of the Judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or

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section.] It seems to us to be clear from the words of this section, that the legislature never intended to give the Courts of common law a power to compel a *discovery* by a bill or analogous proceeding: the only power given is to allow, not a discovery, but an *inspection* by one litigant party of documents in the custody or under the control of the opposite litigant party, with certain restrictions or limitations. First, there must be an action or other proceeding pending. Secondly, the documents must relate to such action or other proceeding. And thirdly, the cases in which inspection is to be granted must be such as those where inspection could be obtained by filing a bill for a discovery or by other proceeding in a Court of equity, at the instance of the same party. All that is stated on the subject of *discovery* is by way of limitation or description of the subject of inspection. We think this question has been put on the right footing by Mr. Charles Pollock in his Treatise on Discovery, pages 9 and 10; and there is a decision of my brother Erle in *Galsworthy v. Norman* (a), after consulting the other Judges of the Queen's Bench, that the Courts of law have no power of compelling a discovery; and this Court, on one or two occasions, has intimated its opinion to the same effect: *Pepper v. Chambers* (b).

In order to accomplish the object of obtaining such in



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exercise of their equitable jurisdiction, to grant such inspection: first, as a substitute for oyer, which at common law applied to some instruments only; by usage, the power of inspection was, with certain conditions, extended to all; secondly, upon the equitable principle that a cestui que trust had a right to oblige his trustee to give inspection, the Courts of law always compelled it, where they could consider the opposite party as holding the document under an express or implied trust for the applicant. In the former case, an affidavit, generally speaking, was unnecessary. In the latter, it was required, unless the facts were admitted in the statement of the applicant's attorney, a course usually adopted at Chambers to save expense. The old mode of obtaining inspection ought to be adopted under the new Act of Parliament, with such alterations as the nature of the case requires. Under the recent Act of Parliament, where an inspection is litigated, an affidavit will no doubt be necessary as to all the disputed facts; and if all are disputed, the affidavit ought to state a sufficient case in all respects to entitle the applicant to inspect, such as would have been necessary to obtain an inspection which the Court had before, and still has, the power to grant at common law. The affidavit, therefore, ought not only to shew that an action or other proceeding is pending, but also to state, not a mere suggestion, but circumstances sufficient to satisfy the Court or Judge, that there are in the possession or under the control of the opposite party certain documents, and that those relate to such action or other legal proceeding; a *primâ facie* case, calling for an answer, must at least be stated in this respect, as it must in the old proceeding, to obtain inspection of documents held by a trustee. Further, the affidavit must shew that the applicant would, by a bill for a discovery or other proceeding, be able to obtain a discovery and inspection of those documents.

Under the last head, we must follow the rules established in Courts of equity, within which every plaintiff must bring

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himself, in order to obtain an inspection by bill of discovery; and therefore, if the facts be disputed, the affidavit ought to state all that a plaintiff in equity must state, in order to entitle himself to a discovery and inspection.

Whatever difference there may be with respect to some points in the law of discovery, for instance, as to the mode of pleading in equity to raise the objection on the part of the defendant, the general principles laid down are free from doubt, and are fully explained in the able treatises of Sir James Wigram and Mr. Hare, and in the little work published by Mr. Charles Pollock.

The right of a plaintiff in equity is limited, first, to a discovery confined to the questions in the cause; secondly, of such material documents as relate to the proof of his, the plaintiff's, case on the trial; and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. The party applying, therefore, who is in the same situation as a plaintiff in equity, must shew, first, what is the nature of the suit, and of the question to be tried in it; and it seems also, that he should depose in his affidavit to his having just ground to maintain or defend it; secondly, the affidavit ought to state with sufficient distinctness the reason of the application and the nature of the documents,

the Courts of law the direct power of compelling a discovery of documents, and in that respect they are not so effective as Courts of equity, they have in truth nearly as great power given by the section in question; for it will rarely happen, where documents material to the issue are really in the hands of the opposite party, that there will not be sufficient circumstances known to the applicant to constitute a *prima facie* case for him, and to justify the interference of the Court or a Judge, if no answer is given to them by affidavit. The new measure will, therefore, in practice be nearly as effective as if the power of compelling a discovery were expressly given to the common law Courts.

It remains to apply these observations to the affidavit in question. It does state the question and ground of defence; viz. that the work was never done; that, if done, it was charged at too high a rate; and further, that it was done on the credit of another, not the defendant. The defendant's case is, therefore, of a negative character; he does not seek to know the evidence by which the plaintiff supports his case, for the journal or day-book would not be evidence for the plaintiff. The defendant in support of such a case has a right to a discovery, on the principle of the case of *Smith v. The Duke of Beaufort* (a); but so far as relates to the discovery of the journal as evidence in support of the defendant's case, that the credit was given to another, the affidavit is defective, as it does not deny that the deponent was authorised to bind the defendant by his contract, and if he was, it is wholly immaterial whether credit was given to him in the plaintiff's journal or day-book or not. But the book must be inspected, to see if there be any entry, and if any, what price is therein charged as the value of the work.

Rule absolute.

(a) 1 Hare, 507; 1 Ph. 209.

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Jan. 13. **HART and Another v. THE EASTERN UNION RAILWAY COMPANY.**

The 7 & 8 Vict. c. lxxxv. (19th July, 1844), "for making a railway from Colchester to Ipswich," empowered the Company to borrow money on mortgage.

DEBT.—The declaration stated, "that, after the passing of four several Acts of Parliament, to wit, The Eastern Union Railway Act, 1844; The Eastern Union Railway Amendment Act, 1845; The Eastern Union (Ardleigh and Colchester) Railway Act, 1846; and a certain Act of Parliament made and passed &c. (10 & 11 Vict. c. clxxiv.), in-
Section 49 enacted, "that the Company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereof, and in such case the Company shall cause such period to be inserted in the mortgage deed or bond; and, upon the expiration of such period, the principal sum, together with the arrears of interest thereon, 'shall be paid' to the party entitled to such mortgage or bond." By sect. 50, if no time was fixed in the mortgage-deed for repayment, the mortgagee might, at the expiration of twelve months, demand payment of the principal and interest, upon giving six months' previous notice; and the Company might at all times pay off the money borrowed upon giving the like notice. By sect. 51, if such interest remained unpaid for thirty days after it became due, and demand thereof made in writing, the mortgagee might either sue for the interest so in arrear by action of debt, or require the appointment of a receiver. By sect. 52, if such principal and interest were not paid within six months after the same became payable and after demand thereof in writing, the mortgagee might sue for the same in any Court of law or equity, or, if his debt amounted to a certain sum, require the appointment of a receiver. The 8 & 9 Vict. c. xciv. (21 July, 1845), after reciting the 7 & 8 Vict. c. lxxxv., incorporates its provisions, and by sect. 6 empowers the Company to borrow money on mortgage as by the recited Act authorised. The 10 & 11 Vict. c. clxxiv. (9 July, 1847) repealed the 7 & 8 Vict. c. lxxxv.; but, by sect. 43, re-enacted the 51st sect. of the repealed Act as to the recovery of interest. The 10 & 11 Vict. c. cxxxv. (22 July, 1847) after reciting the 7 & 8 Vict. c. lxxxv., 8 & 9 Vict. c. xciv., 9 & 10 Vict. c. xcvi., incorporates their provisions then in force. Sect. 7 enables the Company to borrow money, subject to the same or the like provisions as are contained in the secondly recited Act; and sect. 8 enacts that the several provisions of the recited Acts, with regard to the borrowing of monies, shall apply to the monies by that Act authorised to be borrowed. The plaintiff lent to the defendant 1000*l.* upon the security of a debenture in the form given in a schedule to the 7 & 8 Vict. c. lxxxv., which

tituled "An Act to amalgamate the Eastern Union, and Ipswich and Bury St. Edmund's Railway Companies," and after the making of the deed of mortgage hereinafter mentioned, to wit, on &c., it was proved to the satisfaction of the Commissioners of Railways for the time being (whose names being wholly unknown to the plaintiffs, the plaintiffs are unable to state or mention the same), and duly certified by them under their seals, and they did thereupon then grant their certificate as such Commissioners, pursuant to the last mentioned Act of Parliament, that one-half of the whole amount of the capital, exclusive of loans, by the several Acts of Parliament relating to the Company, namely, "The Eastern Union Railway Company," mentioned and referred to in the first-mentioned Act of Parliament, authorised to be raised, and also one half of the capital authorised to be raised by the several Acts of Parliament relating to the Ipswich and Bury St. Edmund's Railway Company, mentioned and referred to in the said Act fourthly above mentioned, had been actually paid up, and expended for the purposes authorised by the several Acts of Parliament relating to the said two last-mentioned Companies respectively; and that thereupon, and by virtue and force of the Act of Parliament fourthly above mentioned, the defendants then became and were incorporated by and under the said name of "The Eastern Union Railway Company," and are the same Company as is mentioned in the Act fourthly above mentioned, and is thereby intended to be incorporated by and under the name of the Eastern Union Railway Company. That, after the passing of the said several Acts of Parliament, and of the "Eastern Union and Harwich Railway and Pier Act, 1847," and before the granting of the said certificate by the Commissioners of Railways, to wit, on the 15th of December, 1847, the Eastern Union Railway Company, in pursuance of the provisions of the said last-mentioned Act, and also of an order of a general meeting of the last-mentioned Company (duly

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held, to wit, on &c.), them in that behalf empowering, by a certain deed of mortgage, duly stamped, and under and sealed with their common seal (profert), in consideration of the sum of 1000*l.* (in the said deed truly stated to be the consideration for the same), by the said Company then borrowed and taken up at interest of and from the plaintiffs, and by the plaintiffs then paid to the Company, did assign unto the plaintiffs, their executors &c., the undertaking in the said last-mentioned Act mentioned and referred to, and all the tolls and sums of money arising by virtue of that Act, and all the estate, right, title, and interest of the Company in the same, to hold unto the plaintiffs, their executors &c., until the said sum of 1000*l.*, with interest for the same at the rate of 5*l.* per cent. per annum, should be satisfied; and in and by the said deed it was stipulated and declared by the said Company, that the principal sum of 1000*l.* should be repaid on the 1st of January, A.D. 1851, being the period fixed by the Company for the repayment thereof, which period elapsed after the granting of the said certificate, and before the demand hereinafter mentioned, and before the commencement of this suit.—Averments, that before the making of the said order of the said general meeting, and the borrowing of the money of and from the plaintiffs as aforesaid, all the monies by the Acts of Parliament and every of them first secondly and thirdly

the plaintiffs have remained and continued to be and still are the holders of and entitled to the said deed of mortgage; and that the said principal sum of 1000*l.* was not, nor was any part thereof, paid to the plaintiffs on the 1st of January, A.D. 1851, so fixed in and by the said deed for the payment thereof; but that the said principal sum hath hitherto remained and still is wholly due and unpaid; and that, after the expiration of the said period so fixed for the repayment of the said sum of 1000*l.*, and after the granting of the said certificate of the Commissioners of Railways, and before the commencement of this suit, to wit, on the 18th June, A.D. 1851, in pursuance of the statutes in that behalf, payment of the said sum of 1000*l.* was demanded by the plaintiffs of and from the defendants, to wit, at their principal office or place of business, to wit, at Ipswich; and thereby and thereupon, and by force of the statutes, &c., it then became and was the duty of the defendants to pay and they became liable to pay to the plaintiffs the said sum of 1000*l.*; and by reason of the premises, and of the non-payment of the said sum, and by force of the statutes, *actio accrevit*, &c.—Breach, non-payment.

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The plea set out the mortgage-deed on oyer, as follows:—

“Eastern Union Railway Company.”

“Debenture Bond.

“Mortgage Number, One	}	“One Thousand
hundred and twelve.		

“By virtue of an Act passed on the 22nd day of July, 1847, intituled “The Eastern Union and Harwich Railway and Pier Act:” We the “Eastern Union Railway Company,” in consideration of the sum of 1000*l.* paid to us by John Hart, of &c., and Charles Bree, of &c., do assign unto the said J. Hart and C. Bree, their executors, &c., the said undertaking, and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right,

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title, and interest of the Company in the same: To hold unto the said J. Hart and C. Bree, their executors, &c., until the said sum of 1000*l*., together with interest for the same at the rate of 5*l*. for every 100*l*. by the year, be satisfied. The principal sum to be repaid on the 1st day of January, 1851. Given under our common seal, &c." The plea then stated, that after the passing of "The Eastern Union and Harwich Railway and Pier Act, 1847," and after the monies had been so subscribed for and half paid up, as in the declaration mentioned, and before the 1st January, 1851, The Eastern Union Railway Company, under that Act and the powers therein contained, and in pursuance of an order of a general meeting of the Company, borrowed on mortgage from other persons divers sums of money, parcels of the 66,666*l*. in the Act authorised to be borrowed, and amounting in the whole to 50,000*l*., and executed to those persons mortgages of the same tolls and sums of money as are mentioned in the above deed-poll to be mortgaged thereby, which mortgages were in the form given in Schedule C. annexed to "The Companies Clauses Consolidation Act, 1845." That the 1000*l*. in the declaration mentioned was another part of the sum of 66,666*l*. and that the several mortgages are still in force

rateably among the mortgagees, of which the plaintiffs had notice. That this action was brought for the purpose of compelling the defendants to pay to the plaintiffs more than the just proportion of the plaintiffs' mortgaged tolls, to the damage and prejudice of the other mortgagees—Verification.

Demurrer, and joinder therein.

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Mellish (*O'Malley* with him) argued in support of the demurrer in last Michaelmas Vacation (Dec. 2 and 3).—The real question is, whether an action *at law* lies against the Eastern Union Railway Company, at the suit of a mortgagee who has advanced money to the Company on the security of a debenture in the form prescribed by the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16. Assuming that an action lies, then, if the money be not paid when demanded, according to the true construction of this instrument, it becomes the subject of an action, and the plea must necessarily be bad; for it is consistent with every allegation in it, that after the mortgage was due the Company had money to pay it. [*Bramwell*, for the defendants, admitted that the plea could not be supported.] The question will then turn partly on the form of the debenture, and partly on the Act itself. The declaration, being in *debt*, is capable of being supported, if there is either a covenant in the debenture to pay, or a provision in the statute, that if the money be not paid when demanded, the mortgagee may sue for it. Now the words of the debenture, "the principal sum to be paid on the 1st day of Jan., 1851," are sufficient to create a covenant to pay on that day, unless controlled by the language of the statute 8 & 9 Vict. c. 16. The clauses which relate to the borrowing of money are from the 38th to the 55th inclusive (*a*). The

(*a*) The following are the material sections of the Companies Clauses Consolidation Act, (8 &

9 Vict. c. 16), referred to in the course of the argument:—

Sect. 38. "If the Company be

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38th enables the Company to borrow money on mortgage or bond, if authorised by the special Act; "and, for secur-

authorised by the special Act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special Act, to borrow on mortgage or bond such sums of money as shall from time to time, by an order of a general meeting of the Company, be authorised to be borrowed, not exceeding in the whole the sum prescribed by the special Act, and for securing the repayment of the money so borrowed, with interest, to mortgage the undertaking, and the future calls on the shareholders, or to give bonds in manner hereinafter mentioned."

Sect. 42. "The respective mortgagees shall be entitled one with another to their respective proportions of the tolls, sums, and premises comprised in such mortgages, and of the future calls payable by the shareholders, if comprised therein, according to the respective sums in such mort-

Company, the respective sums in such bonds mentioned and thereby intended to be secured, without any preference one above another by reason of priority of date of any such bond, or of the meeting at which the same was authorised, or otherwise howsoever."

Sect. 50. "The Company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereof, and in such case the Company shall cause such period to be inserted in the mortgage deed or bond; and upon the expiration of such period the principal sum, together with the arrears of interest thereon, shall, on demand, be paid to the party entitled to such mortgage or bond; and if no other place of payment be inserted in such mortgage deed or bond, such principal and interest shall be payable at the principal office or place of business of the Com-

ing the repayment of the money so borrowed, with interest, to mortgage the *undertaking* and the *future calls* on the

any time pay off the money borrowed, on giving the like notice; and every such notice shall be in writing or print, or both, and if given by a mortgagee or bond creditor shall be delivered to the secretary or left at the principal office of the Company, and if given by the Company shall be given either personally to such mortgagee or bond creditor or left at his residence, or if such mortgagee or bond creditor be unknown to the directors, or cannot be found after diligent inquiry, such notice shall be given by advertisement in the London or Dublin Gazette, according as the principal office of the Company shall be in England or Ireland, and in some newspaper as after mentioned."

Sect. 52. "If the Company shall have given notice of their intention to pay off any such mortgage or bond at a time when the same may lawfully be paid off by them, then at the expiration of such notice all further interest shall cease to be payable on such mortgage or bond, unless, on demand of payment made pursuant to such notice, or at any time thereafter, the Company shall fail to pay the principal and interest due at the expiration of such notice on such mortgage or bond."

Sect. 53. "Where by the special Act the mortgagees of the Company shall be empowered to enforce the payment of the arrears of interest, or the arrears

of principal and interest, due on such mortgages, by the appointment of a receiver, then, if within thirty days after the interest accruing upon any such mortgage has become payable, and, after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any of the superior Courts of law or equity, require the appointment of a receiver, by an application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage has become payable, and after demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of interest, in any of the superior Courts of law or equity, may, if his debt amount to the prescribed sum, alone, or if his debt does not amount to the prescribed sum he may, in conjunction with other mortgagees whose debts, being so in arrear, after demand as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a receiver, by an application to be made as hereinafter provided."

SCHEDULE (C.)

Form of Mortgage Deed.

"The — Company."

"Mortgage, Number——. £——

"By virtue of [*here name the*

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shareholders, or to give bonds in manner thereafter mentioned." The 42nd section defines the rights of mortgagees, who are to be entitled to their respective proportions of the tolls, &c., and to be repaid without priority. The 44th section contains a similar provision with respect to obligees. It will be argued that the 42nd section prevents the bringing of any action on a mortgage debenture; but the same argument would apply to obligees under the 44th section, although there are authorities to shew that

special Act], we, 'The — Company,' in consideration of the sum of — pounds paid to us by *A. B.* of —, do assign unto the said *A. B.*, his executors, administrators, and assigns, the said undertaking, [and (*in case such loan shall be in anticipation of the capital authorised to be raised*) all future calls on shareholders], and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the Company in the same; to hold unto the said *A. B.*, his executors, administrators, and assigns, until the said sum of — pounds, together with interest for the same at the

SCHEDULE (D.)

Form of Bond.

"The — Company."

"Bond, Number —. £—.

"By virtue of [*here name the special Act*], we, 'The — Company,' in consideration of the sum of — pounds to us in hand paid by *A. B.* of —, do bind ourselves and our successors unto the said *A. B.*, his executors, administrators, and assigns, in the penal sum of — pounds.

"The condition of the above obligation is such, that if the said Company shall pay to the said *A. B.*, his executors, administrators, or assigns, [at — *in case any other place of payment than the*

an action may be maintained on those bonds. The 48th section provides for the payment of interest. By the 50th section, the Company may fix a period for repayment of the money borrowed, with interest, at the expiration of which period the principal and interest shall be paid *on demand*. That necessarily imports a right of action. The 53rd section empowers mortgagees to enforce payment of the principal and interest due, by requiring the appointment of a receiver, without prejudice, however, to their right to sue. That clearly recognises the power to bring an action under the 50th section. [*Alderson, B.*—How is that reconcileable with an equitable division among all the mortgagees?] The mortgage does not override the whole effects of the Company, but only includes the tolls and profits of the undertaking; so that, if a receiver be appointed, it is those which he is to apportion among the mortgagees. *Russell v. The East Anglian Railway Company* (a) is an express authority that mortgagees and bond creditors of a Railway Company have no specific lien on the estate and effects of the Company. Again, in *Doe d. Myatt v. The St. Helen's Railway Company* (b), it was held, that a mortgage by a Railway Company of "the undertaking and all and singular the rates, tolls, and other sums arising," &c., did not pass a title to the land, so as to enable the mortgagee to bring ejectment. Since, therefore, the mortgage does not operate as a transfer either of the land or of the goods and chattels of the Company, what ground is there for supposing that the legislature intended to deprive mortgagees of the ordinary power of enforcing their claims by action? Unless they possess that right, what is the meaning of the words "shall be paid on demand" in the 50th section? It could never have been intended that all the mortgagees should make a simultaneous demand; but the meaning must be that any one mortgagee, who makes a demand and meets with a refusal, shall have a right to bring an action.

(a) 3 Mac. & G. 125.

(b) 2 Q. B. 364.

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Bramwell (Oxley with him) for the defendants.—The legislature never intended that any one mortgagee or bond creditor should enforce his claim in opposition to the whole body of creditors and shareholders, and, by bringing an action, prevent the Company from carrying on their undertaking. The Act authorises the borrowing of money, and prescribes the mode in which that is to be effected; and if it were meant that a right of action should exist, the power to sue would have been conferred in express terms. The language of the instrument itself does not empower the mortgagee to maintain any action upon it; his rights and remedies depend upon the statute, and its silence on the subject affords a strong argument that no action will lie. *Pontet v. The Basingstoke Canal Company* (a) is an authority in point. In that case there was a grant of the undertaking, and the interest was to be paid half-yearly; and notwithstanding, it was held that an action of covenant could not be maintained. By section 50, the Company may, if they think proper, fix a period for repayment of principal and interest; and the 51st section provides for repayment when no period is fixed. The form of mortgage deed in the schedule of the Act is the same in both cases, except that in the former the time for repayment is to be inserted. It is manifest that, if no time for repayment be fixed, the deed operates simply as an

repayment; and that there should be no covenant when no period was fixed. In each case the deed has the same effect, and operates as a mere assignment until the debt is paid. The 50th section of the Companies Clauses Consolidation Act gives no right of action to mortgagees; it applies only to cases in which the directors enter into an express covenant to pay, not to the particular instrument mentioned in that Act. The statute embodies a code of laws regulating the transactions of companies, not only with the public, but *inter se*. It imperatively requires that at the expiration of the period fixed the money shall, on demand, be paid; but it could scarcely be contended that a disobedience of that order would subject the directors to an indictment. Neither can the payment be enforced by action, for the remedy is specifically pointed out by the 53rd section. The words in that section, "without prejudice to his right to sue &c. in any of the superior Courts of law or equity," do not admit a right of action; for a bond creditor, to whom they would equally apply, cannot sue for his debt in a Court of equity. Those words were probably inserted *ex majori cautela*, to prevent the creditor from being deprived of any right which he might possibly have. [*Alderson*, B.—It is similar to the words "without prejudice to the rights of the Crown or other persons," in a private Act of Parliament, which only mean "if they have any rights," otherwise the Act would give them rights which they did not possess.] But the 42nd section is conclusive to shew that no action is maintainable, for it provides that "the respective mortgagees shall be entitled one with another to their respective proportions of the tolls, sums, and premises comprised in such mortgages." By the 43rd section, the lien created by the 42nd is not to extend to future calls. The 44th section, which defines the rights of obligees, enacts, that they shall be entitled to be *paid* out of the tolls, &c. There is no reason for this difference in the language of the 44th and 42nd sections, unless it be

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that a mortgagee is to have a share in the things mortgaged, and not a right of action, while the bondholder is entitled to actual payment. That view is supported by reference to the forms of a mortgage deed and bond, as given in the schedule, the latter of which raises a legal obligation to pay, but the former contains no stipulation amounting to a covenant. The Act itself, then, not only gives no remedy by action, but is wholly inconsistent with it, and in addition contains a clause which precludes any presumption that an action will lie. If a mortgagee were allowed to sue, he might issue an elegit, and so obtain that preference which the legislature has expressly forbidden. These Companies are not compelled to carry, but are incorporated for the purpose of forming a railway, to be used by others; and it is the profit of that undertaking which was intended to be pledged, not the profits of their trade. *Russell v. The East Anglian Railway Company* (a) does not affect the present question; for it is conceded, that a judgment creditor may issue execution against the effects of the Company, though specifically mortgaged. It may be that in some Acts there is no provision for the appointment of a receiver, in which case the legislature may have contemplated an express covenant. *Doe d. Myatt v. The St. Helen's Railway Company* is no authority that an action of mortgage is maintainable. (Martin, B., *supra*, *Dring*

July, 1844), provided a remedy for the recovery of arrears of interest, by enacting that, if in arrear for thirty days

exceeding in the whole the sum of 66,666*l.*, and for securing the repayment of the money so borrowed, with interest, to mortgage the railway and the future calls on the shareholders of the Company, or to give bonds, in manner hereinafter mentioned."

Sect. 49. "That the Company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereof, and in such case the Company shall cause such period to be inserted in the mortgage deed or bond; and upon the expiration of such period, the principal sum, together with the arrears of interest thereon, shall be paid to the party entitled to such mortgage or bond."

Sect. 50. "That if no time be fixed in the mortgage deed or bond for the repayment of the money so borrowed, the party entitled to the mortgage or bond may, at the expiration or at any time after the expiration of twelve months from the date of such mortgage or bond, demand payment of the principal money thereby secured, with all arrears of interest, upon giving six months' previous notice for that purpose, and the Company may at all times pay off the money borrowed, or any part thereof, on giving the like notice; and such notice, if given by a mortgagee or bond creditor, shall be by writing delivered to the secretary, and if given by the Company shall be by writing given

either personally to such mortgagee or bond creditor, or left at his residence, or if such mortgagee or bond creditor be unknown or cannot be found, such notice shall be given by advertisement in the London Gazette, and in some newspaper as after mentioned; and at the expiration of the said notice, when given by the Company, interest shall cease to be payable on the money secured by such mortgage or bond, unless, on demand of such money, the Company fail to pay the same pursuant to such notice."

Sect. 51. "And in order to provide for the recovery of the arrears of interest and costs, or of the principal and interest and costs, of any such mortgage or bond, at the respective times at which such interest, or such principal and interest and costs, become due, be it enacted, That if such interest or any part thereof shall for thirty days after the same shall have become due, and demand thereof shall have been made in writing, remain unpaid, the mortgagee or bond creditor may either sue for the interest so in arrear by action of debt in any of the superior Courts, or he may require the appointment of a receiver by an application to be made as hereinafter provided."

Sect. 52. "And with respect to such principal money, interest, and costs, be it enacted, That if such principal money and interest be not paid within six months after the same has become payable, and after demand thereof in

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after demand in writing, the mortgagee or bond creditor might sue for the same by action of debt. The 52nd section gave the like remedy by action, in case of the non-payment of the principal money within six months after it became due, and after demand in writing; or the mortgagee or bond creditor might require the appointment of a receiver. That statute, however, was repealed by the 10 & 11 Vict. c. clxxiv. (a) s. 2 (9th July, 1847). This mortgage was given under the 10 & 11 Vict. c. ccxxv. (b), (22nd July, 1847),

writing, the mortgagee or bond creditor may sue for the same in any of the superior Courts of law or equity; or if his debt amount to the sum of 5000*l.* he may alone, or if his debt does not amount to the sum of 5000*l.* he may in conjunction with other mortgagees or bond creditors whose debts, being so in arrear after demand as aforesaid, shall, together with his, amount to the sum of 10,000*l.*, require the appointment of a receiver by an application to be made as hereinafter provided."

The Schedule to this Act gave a form of mortgage deed and of bond, which were precisely the same as the forms in Schedule

consistent with the provisions thereof, shall be held to apply to the new Company."

Sect. 43. "And in order to provide for the recovery of the arrears of interest and costs, or of the principal and interest and the costs, of any such mortgage or bond as may have been or may be granted by either of the dissolved Companies or by the new Company, at the respective times at which such interest or such principal and interest and costs become due, be it enacted, That if such interest or any part thereof shall for thirty days after the same shall have become due, and demand thereof shall have been

which, by section 1, incorporates all the provisions of certain recited Acts, viz. the 7 & 8 Vict. c. lxxxv., 8 & 9 Vict.

to Harwich, with Branches there-out, and for other Purposes."

The following sections were referred to:—

Sect. 1, after reciting the 7 & 8 Vict. c. lxxxv., 8 & 9 Vict. c. xciv., 9 & 10 Vict. c. xcvi., enacts, "That all the provisions contained in the said recited Acts relating to the Eastern Union Railway, so far as the same are now in force, and except such of them as are inconsistent with the provisions of the 'Lands Clauses Consolidation Act, 1845,' and the 'Railways Clauses Consolidation Act, 1845,' and except such as are by this Act altered or otherwise provided for, shall extend to this Act, and to the several purposes thereof, as fully and effectually as though such provisions were re-enacted in this Act as applicable to such purposes."

Sect. 2 enacts, "That all the provisions of the said 'Lands Clauses Consolidation Act, 1845,' and of the said 'Railways Clauses Consolidation Act, 1845,' and also the provisions of an Act passed during the present session of Parliament, called 'The Harbours, Docks, and Piers Clauses Act, 1847,' shall extend to this Act, and to the objects and purposes thereof, save in so far as the said provisions may be inconsistent with the provisions hereinafter contained, and the said Acts and this Act shall for the objects and purposes aforesaid be read as one Act."

Sect. 7. "That after the whole of the sum hereinbefore authorised to be raised by shares shall have been subscribed, and one half thereof, and of the sum by the said recited Acts authorised to be raised by shares, shall have been paid up, it shall be lawful for the Company, subject to the same or the like provisions as are contained in the said secondly recited Act with reference to the monies thereby authorised to be borrowed, to borrow on mortgage or bond such sums of money as shall from time to time be authorised to be borrowed by an order of any general or special general meeting of the Company, not exceeding in the whole the sum of 66,666*l.*, in addition to the sums which they are by the said recited Acts authorised to borrow, and in addition to the sums which they may be authorised to borrow by any other Act to be passed in the present session of Parliament."

Sect. 8. "That the several provisions of the said recited Acts with regard to the borrowing of the monies thereby authorised to be borrowed, and the conversion thereof into capital, and as to the creation of shares or stock in lieu of borrowing the same, and as to consolidating the old with the new shares of the Company, shall equally apply to the monies by this Act authorised to be borrowed and the shares by this Act authorised to be created."

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c. xciv. (a), 9 & 10 Vict. c. xcvi., except so far as they are inconsistent with the Lands Clauses and Railways Clauses Consolidation Acts, or are altered by that Act. Section 2 incorporates "The Lands Clauses Consolidation Act, The Railways Clauses Consolidation Act, and The Harbours, Docks, and Pier Clauses Act," except so far as their provisions may be inconsistent with that Act. The 7th and 8th sections authorise the borrowing of money, subject to the provisions of the 8 & 9 Vict. c. xciv.; and by section 9, mortgages or bonds created under that Act are to have pri-

Sect. 9. "Provided always, that all mortgages or bonds which may have been already created under the powers of the said recited Acts shall during the continuance thereof have priority over any mortgages or bonds to be created by virtue of this Act."

(a) 8 & 9 Vict. c. xciv. (21st July, 1845), "An Act to amend the Act relating to the Eastern Union Railway Company, and to raise a further Sum of Money for the Purposes of the said Undertaking."

The following sections were referred to:—

Sect. 1 recites the 7 & 8 Vict.

the sum of 16,666*l.*, in addition to the sum which they are by the said recited Act authorised to borrow, and for securing the repayment of the sums so respectively from time to time borrowed, with interest, to mortgage the said undertaking, as by the said recited Act authorised, and also, if they think fit, the whole or any of the future calls on the shareholders of the Company, or to give bonds in manner hereinafter mentioned."

Sect. 7. "That if, after having borrowed all or any part of the money so authorised to be borrowed on mortgage or bond, the

ority. The 41st section of the 10 & 11 Vict. c. clxxiv. empowers the Company to borrow on mortgage or bond, after the granting of a certificate by the Railway Commissioners that one-half of the capital has been paid up. The 42nd section gives priority to old mortgages. The 43rd section (a), in order to provide for the recovery of arrears of interest and costs, or of the principal and interest and costs, enacts that if the interest shall remain unpaid for thirty days after demand in writing, the mortgagee or bond creditor may sue *for the interest* so in arrear by action of debt, or he may require the appointment of a receiver. The obvious intention was to give a remedy by action in respect of the interest only, and not of the principal. That is rendered more clear by reference to the 51st and 52nd sections of the repealed Act, 7 & 8 Vict. c. lxxxv. The 10 & 11 Vict. c. clxxiv. is in the nature of a legislative declaration that interest only is recoverable by action; for it repeals the 7 & 8 Vict. c. lxxxv., which gave a remedy by action for the principal, without substituting any similar provision, and then enables the parties to sue for the interest: *expressio unius est exclusio alterius*.—But, assuming that the plaintiff can sue for the principal under the 53rd section of the Companies Clauses Consolidation Act, this declaration is bad for want of an averment that the six months mentioned in that section had elapsed, and that there had been a demand in writing.

Mellish in reply.—With respect to the last objection, it appears by the record that six months intervened between the time when the money became due and the commencement of the action; and on general demurrer there is a sufficient allegation of a demand in writing, for it is stated that the demand was made “in pursuance of the statutes in that behalf.” As to the other point, it is clear that the

(a) See the section, p. 260.

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7 & 8 Vict. c. lxxxv. gave a remedy by action for both principal and interest; and when the legislature repealed that Act by the 10 & 11 Vict. c. clxxiv.(a), they incorporated with it the Companies Clauses Consolidation Act, and so gave a remedy under the 53rd section of the latter Act. It cannot be supposed that the legislature would, by a retrospective statute, deprive a creditor of the remedy which they had before granted. There is no express enactment that the principal shall not be recovered by action, and it cannot be implied from the power to sue for interest. Even if no express day was appointed for payment, the Company would be liable to an action of covenant after the requisites of the 50th section had been complied with; for, by executing an instrument under seal, they impliedly covenanted to do all that the Act requires. The 42nd section is not at all repugnant to this view. As to the argument *ab inconvenienti*, of allowing some creditors to have a preference over others, the same inconvenience will arise from permitting bond creditors to sue, and yet it is clear that an action will lie upon a bond. *Pontet v. The Basingstoke Canal Company* has little bearing on this case, for there neither the private Act nor the mortgage instrument contained any provision creating an obligation to pay the principal.

Cur. adv. vult.



If we regard the form of the instrument only, without reference to the legislative provisions contained in the several local and personal Acts relating to this Company, and those in the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, we think that an action is maintainable upon it. The first part merely assigns, in consideration of 1000*l.*, the undertaking and all the tolls and sums of money arising by virtue of the Act, to hold until the sum of 1000*l.*, with 5*l.* per cent. interest per annum, should be satisfied. If the instrument had stopped there, it would have operated simply as a transfer (commonly, but improperly, called a mortgage) of the subject matter *till* the sum was satisfied thereout. The subject conveyed would be the tolls certainly, the unpaid calls, and probably all that belonged to the Company as the proprietors of the railway, which any one is at liberty to use on paying tolls, but not the stock or property belonging to the Company as common carriers of passengers or goods for hire, nor, according to the case of *Doe d. Myatt v. St. Helen's Railway Company* (a), the soil of the railway itself. The Railway Acts have been prepared on the model of the Canal Acts, in which the principal object of the Company was the proprietorship of the canal, and the profits derived from the use of it by the public in general; but soon after the establishment of railways, it was found that the Company alone could use them beneficially, by themselves monopolising the conveyance upon them; so that the theory of these Acts and the practice under them are entirely at variance.

So far the instrument we are considering would give no right of action to the plaintiffs, and would resemble that in *Pontet v. The Basingstoke Canal Company* (b); but in the conclusion is the stipulation, that the principal *is to be repaid* on the 1st of January, 1851; and this certainly imports

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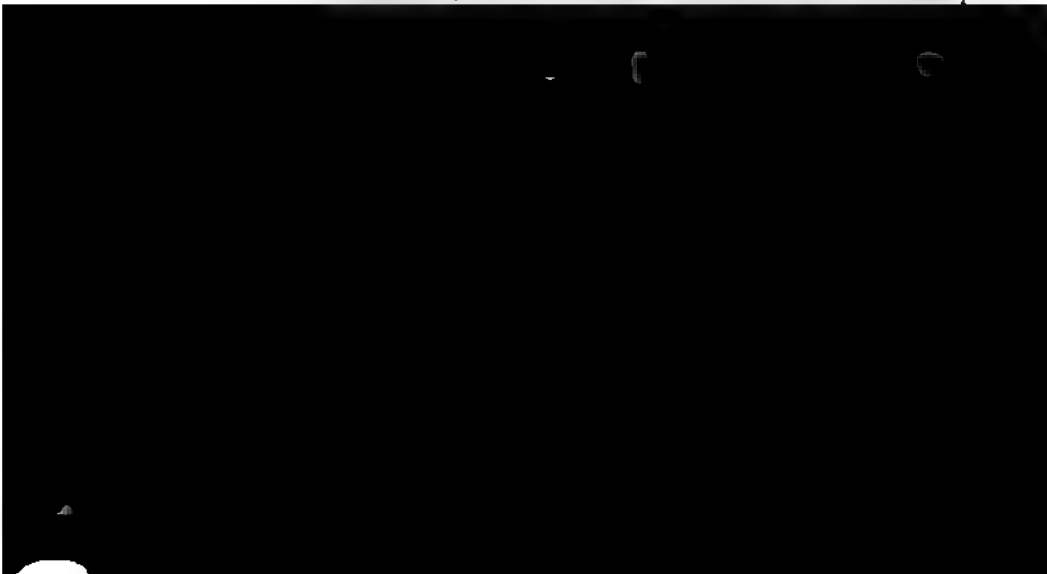
(a) 2 Q. B. 364.

(b) 3 Bing. N. C. 433.

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a covenant by the Company that the sum shall be repaid on that day, unless there be something in the Acts to qualify or alter the meaning of that expression. The effect then of the instrument would be, to pledge the tolls and property of the Company *as proprietors*, but not their stock or property *as carriers*, and to impose an obligation on them to repay the principal on a certain day; for the breach of which an action would lie against the Company, the judgment in which action would be satisfied out of their general property belonging to them as carriers or otherwise.

It remains to be considered what the effect of the statutes is upon the construction of the instrument. The money appears, by the statements in the declaration, to have been borrowed under the powers of the statute 10 & 11 Vict. c. ccxxv., by the Eastern Union Railway Company, amalgamated and incorporated under the 10 & 11 Vict. c. clxxiv. This statute, by section 5, incorporated the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16. The 10 & 11 Vict. c. ccxxv. contains no clauses as to the form or effect of the securities for the money borrowed under its provisions, but it refers to certain prior railway Acts, which are the 7 & 8 Vict. c. lxxxv., 8 & 9 Vict. c. xciv., 9 & 10 Vict. c. xcvii., and to the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20; and enacts, that all the pro-



inafter contained; and the said Acts and that Act shall, for the objects and purposes thereof, be read as one Act. There is no small difficulty in construing an Act so made up from different parts of other Acts, partly repealed and partly not, but, upon the best consideration we can give, the result is, that the Acts do not affect the right of action for the principal. The 7 & 8 Vict. c. lxxxv. s. 51, provided a remedy for the interest, if in arrear for thirty days after demand in writing, by allowing the mortgagee to sue for the interest by action of debt in any of the superior Courts, *or* by requiring the appointment of a receiver. Section 52 provides a similar alternative remedy for the principal, if it be not paid in six months after due, and after demand in writing, in which case the mortgagee may either sue in the superior Courts, *or* have a receiver. But this Act was repealed by the 10 & 11 Vict. c. clxxiv. (local and personal), s. 2, and therefore was not in force at the time of the passing of the 10 & 11 Vict. c. ccxxv. (local and personal); and then the 10 & 11 Vict. c. clxxiv. re-enacts the 51st section providing for the interest, but not the 52nd section, which provides for the right of action for the principal, or the appointment of a receiver to recover its payment; and this creates a doubt whether the legislature did not intend to take away the right of action for the principal altogether, leaving the mortgagee a right of action for the interest, and if that was unpaid for thirty days, and a demand had been made in writing, a right to have a receiver, and by that means to recover both.


But the sections 51 and 52 of the repealed Act, 7 & 8 Vict. c. lxxxv., are susceptible of a different construction, *viz.* that in case the interest in the one case, or the principal in the other, should be in arrear for the times prescribed, and demands should be made in writing, the mortgagee might either use the right of action to recover it, *which he already had by law*, or he might *have a receiver appointed*. The section may be construed not *to give* a right of action,

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but to recognise it as already existing, and to give the right of having a receiver instead of or in addition to it, and after thirty days' or six months' delay of payment of interest or principal, as the case might be. The repeal, therefore, of the 52nd section would not take away the right of action, for it existed independently of that clause. The framer of the Act probably thought it unnecessary to re-enact the 52nd section, as its place would be supplied by the 53rd section of the Companies Clauses Consolidation Act, which provides for the application of the remedy of a receiver, when the principal is in arrear for six months and demand has been made in writing; and also enacts that it shall be exercised without prejudice to the right to sue for the principal, which right it thereby recognises. To this it may be added, that the Companies Clauses Consolidation Act, by section 50, expressly provides, that if a day is fixed for the payment of the money secured by the mortgage, the money must *be paid on that day* to the party interested; and the meaning must be, that if then not paid it must be enforced by action.

We are therefore of opinion, that the right of suit which the mortgagees have under such an instrument as that declared upon, is not taken away or affected either by the Companies Clauses Consolidation Act, or any of the special Acts referred to in the statute 10 & 11 Vict. c. 12.



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BHEAR v. HARRADINE.

Jan. 31.

ASSUMPSIT on an award. The declaration recited that, certain differences having arisen between the plaintiff and the defendant, by order of *Alderson*, B., and by consent, all matters in difference between the plaintiff and the defendant were referred to the award and determination of one S. G.; and by the said order it was directed, that the costs of the reference and award should be in the discretion of the arbitrator; and that the said order might be made a rule of Court. It then averred, that afterwards, to wit, on &c., S. G. made his award, by which (inter alia) he awarded that the defendant should pay to the plaintiff, within one month, all the costs of the reference and award, to be taxed by one of the Masters of this Court; that the said order was made a rule of Court, and that the said costs were taxed by a Master of this Court at 55*l.* 1*s.* 6*d.* Averment, that the defendant, being so liable, in consideration thereof promised the plaintiff to pay him the said sum according to the tenor of the award. Breach, non-payment.

The defendant in his second plea set out the award verbatim. Among other recitals, it was stated that, at the time of the reference, the defendant claimed to have been a partner in a certain business with the plaintiff, from the 14th of January, 1850, and to be jointly entitled to the profits thereof, and that the defendant claimed a certain sum from the plaintiff in respect of certain services and labour performed by the defendant for the plaintiff, and for money advanced to the plaintiff by the defendant; and that, in the assertion of his right, he had entered upon the premises where the business was carried on, whereupon the plaintiff had ordered him to be taken into custody, for

Upon a reference by a Judge's order, where the costs of the reference and award are to be in the discretion of the arbitrator, and the order contains the usual clause, that the order may be made a rule of Court, and the order is afterwards made a rule of Court, and the arbitrator awards the costs to be paid by one of the parties, to be taxed by an officer of the Court, the award is good, although no cause was pending at the time of the order of reference.

Where one of the matters in difference between A. and B., the parties to a submission to arbitration, was, whether at the time of the submission on a day therein named, a copartnership existed between them, and if it ever did exist, whether the same had been put an end to, and if so, at what time and

on what day; and the arbitrator found by his award that, if any copartnership ever existed between them, the same was dissolved and put an end to by mutual consent and agreement on a certain day (subsequent to that mentioned in the submission), and that nothing was due from A. to B. in respect of profits:—*Held*, that, as the arbitrator did not find whether the copartnership did exist or not, the award was bad.

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which he claimed compensation; that the plaintiff denied the defendant's right to be considered a partner, or that any thing was due to the defendant, and asserted that he was rightfully taken into custody. It was also stated, that the said recited matters were matters in difference between the plaintiff and the defendant; and also that it was and is a matter in difference, whether, if such copartnership ever really existed, the same had been put an end to; and if so, at what time and on what day. The award then recited the Judge's order for a reference, and that such order might be made a rule of Court; and that in the event of either party disputing the validity of such award, or of moving the Court to set it aside, the Court might remit the matters referred or any of them to the arbitrator: and the material part of the award was as follows:—"I do hereby award, determine, and find, that no deed of partnership whatsoever, establishing any copartnership between the said F. Bhear and J. B. Harradine in the said trade and business, ever existed at any time whatsoever. I also award, determine, and find that, *if any copartnership ever existed between them, the same was dissolved and put an end to, by their mutual consent and agreement, on the 30th of August last past.* I also award, find, and determine that, at the time of the making of the said order, no sum of money whatsoever was due or now is due from the said

The defendant pleaded, thirdly, that no action or other proceeding had been commenced or was pending in the Court of Exchequer, or any other Court, between the plaintiff and the defendant or either of them, either alone or with any other person or persons, before or at the time when the said order of reference was made, wherefore the said order and the said rule of Court are void in law.—
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General demurrer to each of these pleas, and joinder.

G. T. White argued in support of the demurrer (*a*) (Jan. 21).—First, as to the second plea, the award is good; for the arbitrator has substantially disposed of all matters referred to him.

The third plea is bad. The action lies, although no cause existed at the time of the order of reference; for the order was made by the mutual consent of both parties. The Judge by whom the order was made may be considered as the agent of both parties, for making the terms of the submission of reference. *Wharton v. King* (*b*) is an express authority that, in such a case, the action is maintainable. [*Parke, B.*—It will be contended on the other side, that the taxation of the costs does not depend upon the agreement to refer, but upon the Judge's order being made a rule of Court.] The submission is clearly good within the stat. 9 & 10 Will. 3, c. 15; and the submission made by consent gives the power of making the order a rule of Court, and gives the arbitrator discretion over the costs, which may be taxed by an officer of the Court.

Brewer contra.—With respect to the third plea, the arbitrator has no power to delegate his authority, by referring the costs to be taxed by the Master. [*Parke, B.*—There are several authorities which shew, that, if the sub-

(*a*) Before *Pollock, C. B., Parke, B., Alderson, B.*

(*b*) 1 Moo. & Rob. 96.

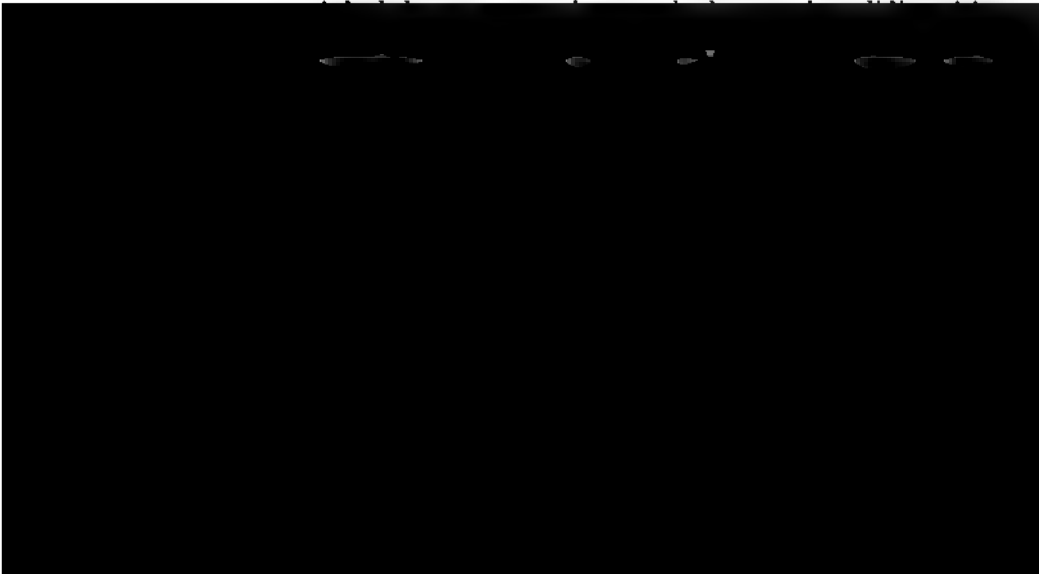
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mission be made a rule of Court, the Master may tax the costs. Here the terms of the submission are agreed upon by the parties; and one of those terms is, that the submission may be made a rule of Court, and all the consequences of the submission being made a rule of Court follow, and the Master has power to tax. The second plea is therefore bad.]

The award is not final, and is therefore bad. The arbitrator has not decided whether any copartnership ever did exist between the parties. He has merely found that, if it did, it was put an end to on a certain day. This is one of the matters upon which the arbitrator was expressly bound to decide. Liabilities may have existed between the parties, to which either one or the other of them may be bound to contribute. The second plea is therefore good.

White in reply.—The latter objection might hold good on special demurrer; but the arbitrator has substantially decided the matter referred. He finds the date of the dissolution. The award may be remitted back to the arbitrator. The defendant, therefore, cannot take the objection to the award in this form.

POLLOCK, C. B.—We are of opinion that the third plea



ant is entitled to our judgment upon it. We intimated, during the course of the argument, that the plaintiff was entitled to judgment on the third plea.

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Judgment accordingly.

FAVIELL v. GASKOIN and Others, Executors of W. CLODE.

Jan. 15.

ASSUMPSIT.—The declaration stated that, in consideration that the plaintiff, at the request of one W. Clode, since deceased, would become tenant to the said W. Clode of a certain farm called the Crown Lands, and would, as such incoming tenant, pay to W. Clode, according to the custom of the country, the amount of the usual valuation paid by an incoming tenant for fallows, half fallows, dressings, &c., each party to appoint a valuer, the said W. Clode promised the plaintiff that he would, at the expiration of the term, pay to the plaintiff, as outgoing tenant, according to the custom of the country, the amount of such valuation for fallows, half fallows, dressings, &c.—Averment, that the plaintiff became tenant to W. Clode upon the terms aforesaid.—Breach, that W. Clode, in his lifetime, and the defendants as such executors since his death, did not nor would appoint a valuer, but wholly refused so to do.

The defendants' testator, being in possession of an estate, of part of which he was the owner, and another part of which consisted of Crown lands leased to him for a term, expiring on the 10th of October, 1849, contracted with the plaintiff for the sale to him of the former part, and, by agreement, demised to him the Crown lands for one year from the 29th of September, 1848; and the plaintiff agreed that he would abide by, per-

The defendants pleaded (inter alia) non assumpserunt,


form, and keep all and singular the covenants and agreements contained in the Crown lease; and the testator agreed, that, in case he should be able to obtain a further lease from the Crown for fourteen years, he would grant to the plaintiff a lease for thirteen years, subject to the same covenants. By a memorandum subsequently signed by the plaintiff, he agreed to take (with others) the Crown lands, "subject to the same rents, covenants, and obligations, in all respects," as were contained and provided for in the leases by which the testator held, or should hold, the same. The plaintiff, on taking possession, paid to the outgoing tenants, according to the custom of the country, the amount of the valuation for fallows, &c., as well of the other lands as of the Crown lands. By the terms of the Crown lease, the custom of the country in that respect was excluded. At the desire of the plaintiff, the Crown lease was not renewed:—*Held*, first, that the custom of the country was not excluded by the agreement between the parties; secondly, that, where such a custom exists, there is an implied contract on the part of the landlord, that, if there be no incoming tenant, he will pay the outgoing tenant according to the custom.

Seemle, that such a custom does not apply to cases where the term is put an end to by the determination of the landlord's interest.

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and a denial of the tenancy upon the terms stated in the declaration.—Upon which issues were joined.

At the trial, before *Jervis*, C. J., at the last Surrey Summer Assizes, it appeared that the action was brought by the plaintiff, as the outgoing tenant of a farm, to recover from the defendants, who were the executors of his landlord W. Clode, the sum of 287*l.* for fallows, half fallows, dressings, &c., under the following circumstances:—W. Clode was the owner of an estate near Windsor, called the Bakeham-house estate, which consisted of four separate properties: first, of the dwelling-house and lands adjoining, called Bakeham-house, which formed the chief portion of the estate; secondly, of Little Bakeham farm, held by him under a lease from a Miss Mackason; thirdly, of two cottages and land, of copyhold tenure; and fourthly, of certain Crown lands held by him under a lease from the Commissioners of Woods and Forests, dated the 5th of March, 1841, for a term of fourteen years from the 10th of October, 1835, at a rent of 92*l.* W. Clode being desirous of selling the Bakeham-house and lands, and the plaintiff of purchasing them, it was arranged that the plaintiff should become the tenant of the property, with the option of afterwards becoming the purchaser; and accordingly the following memoranda and agreements were prepared and signed by the parties or their agents.



on the 10th of October next." W. Clode then agreed that, in case he should be able to obtain a further lease from the Crown of the said premises for fourteen years, he would grant to the plaintiff a lease of the same for thirteen years, at rents payable quarterly, "and subject to covenants, clauses, provisoes, conditions, and agreements, similar in all respects to those which may respectively be reserved and contained in the new lease, which may as aforesaid be obtained by the said W. Clode from the Crown." By the terms of the Crown lease, the custom of the country, as between landlord and outgoing tenant, was excluded.

By a memorandum, dated the 29th of December, 1848, the plaintiff agreed to take as tenant the Bakeham estate, consisting of the dwelling-houses, offices, farm-buildings, twelve cottages, two of which were stated to be the separate property of W. Clode, and about 177 acres of land, and a lease was to be granted for fourteen years, determinable on certain terms, the plaintiff to have the option of purchasing the estate. The plaintiff agreed to pay for fallows, half fallows, dressings, &c., on the farm, at a fair valuation, each party appointing his own valuer.

A memorandum, dated the 2nd of February, 1849, and signed by the plaintiff, was as follows:—"Being desirous of securing the occupation of the farm and lands adjoining the Bakeham estate, Egham, which I have lately taken of Mr. Clode, belonging to the Crown and to Miss Mackason, but held by Mr. Clode by leases about to be renewed, I hereby agree and engage to take the said farm and lands belonging to the Crown and Miss Mackason, as under-tenant to Mr. Clode, subject to the same rents, covenants, and obligations in all respects as are contained and provided for in the leases by which Mr. Clode holds or shall hold the same, excepting that the term is to be determinable at the same time as my lease of the Bakeham estate.—Witness my hand, W. F. Faviell."

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A memorandum of the 7th of February, 1849, stated that the plaintiff took to the Bakehouse estate, and to the Crown lands and Miss Mackason's lands, as from last Michaelmas, from which quarter-day the leases were to commence. There was another memorandum, also dated the 7th of February, 1849, which contained, amongst others, the following stipulation:—"And in consideration of this allowance of 200*l.*, and of the said W. Clode engaging to grant leases of certain contiguous lands as held by him of the Crown and of Miss Mackason, when renewed, together about 112 acres, little more or less, without any bonus or increased rent (but determinable at the same period as the Bakeham lease), the said W. F. Faviell agrees to take to the said contiguous lands, with the buildings thereon in their present state, without any further allowance for any repairs that are or may be hereafter required to or for the said buildings."

On the 12th of January, 1849, the plaintiff wrote to the agent of W. Clode as follows:—"I hope Mr. Clode has by this time renewed the lease of the Crown lands and Miss Mackason's; because, if that is not done, I cannot be expected to pay the valuation for dressings, &c., which I shall never have the benefit of. The lease of the Crown lands might be seven or fourteen years; I do not care much

The plaintiff gave up possession of the Crown lands on the 10th of October, 1849, when he claimed as outgoing tenant to be paid for fallows and dressings, &c., according to the custom of the country.

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It was objected, on the part of the defendants, first, that the custom of the country was excluded by the terms of the contract; secondly, that, if not, the custom did not include a case where the term was determined by the expiration of the landlord's interest. It was also objected, that there was no obligation on a landlord to pay according to the custom of the country. The learned Judge left it to the jury to say, whether the custom for a landlord to pay the outgoing tenant was proved; and the jury having found in the affirmative, his Lordship directed a verdict for the plaintiff, reserving leave for the defendants to move to enter a verdict for them, if the Court should be of opinion that, on the construction of the documents, the custom of the country was excluded by the agreement between the parties.

Channell, Serjt., in the following Michaelmas Term, obtained a rule nisi accordingly; against which


Bramwell (*Raymond* with him) now shewed cause.—The plaintiff, as outgoing tenant, is entitled, according to the custom of the country, to be repaid the value of the fallows and dressings of the Crown lands, which, as incoming tenant, he paid to the defendants' testator. The plaintiff's interest in those lands ceased by effluxion of time, on the 29th of September, 1849, and not by reason of the expiration of his landlord's interest. There is nothing in the agreements or memoranda to exclude the custom of the country. The plaintiff merely stipulates that, with respect to the rents and covenants in the Crown lease, he will stand in the same situation as his landlord.

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The Court then called on

Channell, Serjt., (*Bovill* with him), to support the rule.—
The intention of the plaintiff was, to obtain the same interest in all the properties as his landlord W. Clode had, and he paid the value of the fallows and dressings, not with reference to a tenancy which was to be determined on the 29th of September, 1849, but in anticipation that the Crown lease would be renewed for a term of years. That is evident from his letter of the 12th of January, 1849, in which the plaintiff says, "I hope Mr. Clode has by this time renewed the lease of the Crown lands and Miss Mackason's; because, if that is not done, I cannot be expected to pay the valuation for dressings, &c., which I shall never have the benefit of." The plaintiff did not pay for the dressings according to the custom of the country, but upon the supposition that he was to have a term of years under the Crown lease. He afterwards desired that it might not be renewed. It is true, that the plaintiff took the Crown lands as tenant for a year, but he took them subject to the stipulations contained in the Crown lease. [*Parke*, B.—That is, he was to indemnify the testator as to all covenants which he had entered into with the Crown.] The testator had no claim against the Crown for fallows and dressings, and it was never intended that the plaintiff



in this case there is no legal obligation on the landlord to pay for fallows and dressings. In ordinary cases, a landlord may be liable where there is no incoming tenant, on the ground that he takes to the land; but here the landlord's interest had expired at the time the plaintiff gave up possession.

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PARKE, B.—The rule ought to be discharged. The first question is, whether the custom of the country has been excluded by reason of the agreements between the parties. In considering that question, we must look only to the articles of agreement relating to this particular farm, and see whether they contain anything to exclude the custom of the country, that an outgoing tenant is to be repaid at the end of the term what he has paid at his entry upon the premises. There is no provision in the articles of agreement at all inconsistent with the idea that the outgoing tenant is to be repaid. The only clause, which forms any foundation for the argument on the part of the defendants, is that in which the plaintiff agrees "to abide by, perform, and keep all and singular the covenants and agreements contained in a certain indenture of lease, dated the 5th of March, 1841," &c. But the meaning of that is, obviously, nothing more than that the plaintiff is to perform all the covenants in respect of the occupation and cultivation of the land which W. Clode was under. Therefore that stipulation does not exclude the custom of the country. Moreover, the agreement contemplates a lease which would expire on the 29th of September, 1849, so that the time of quitting is not the same as under the Crown lease. Then, with respect to the custom of the country being excluded by the intention of the plaintiff to take the four distinct properties; in my opinion there is no foundation for the argument, that the desire to become the occupier of them all was the consideration for the plaintiff's fore-

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going his right to be paid as outgoing tenant. When we look at the obligation created by taking this particular property, it turns out literally to be nothing more than a demise for a year; and the custom of the country applies to that.

The next question is, whether the *landlord* is liable to pay to the outgoing tenant the expenses which, in the ordinary course, an incoming tenant would have to pay: and I think that, if there be no incoming tenant, the landlord is the person who, by the custom of the country, is bound to pay the outgoing tenant. No doubt, actions are frequently brought by the outgoing tenant against the incoming tenant; but the contract is with the landlord, that he will pay the outgoing tenant the amount of the valuation which the latter has paid upon his entry. But, by the custom of the country, when an incoming tenant takes possession, there is a contract implied upon his part, though *prima facie* the contract is with the landlord. If, however, there be no incoming tenant, then the landlord, by virtue of the original contract, is bound to pay, and accordingly in this case he ought to have paid on the 29th of September, 1849. The other ground of argument was, that the custom did not apply to cases in which the term was put an end to by the determination of the landlord's interest. If indeed, in this case the landlord's interest

MARTIN, B.—I am of the same opinion. With respect to the second point, the meaning of such a contract is this, that, at the time the tenancy commences, the landlord and tenant enter into a special contract, the one to receive and the other to pay the value of the tillages, to be repaid by the landlord at the expiration of the term. That is as much a part of the terms of the tenancy as if it were contained in the lease itself. It is true that in ninety-nine cases out of a hundred a new tenant comes in and takes the tillages for his own profit, and so becomes a debtor to the outgoing tenant. But still the landlord is liable upon his special contract, and the incoming tenant is liable in indebitatus assumpsit, by reason of his taking the benefit of what was left. Then as to the other point, the truth is, the verdict is conclusive. The agreement does not exclude the custom of the country. What Mr. Clode's intentions were is not material; it may be that he never would have entered into this agreement if he had known its effect; but the jury have found that the custom of the country existed.

Rule discharged.

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Jan. 13. **DICKINSON and Another v. THE GRAND JUNCTION CANAL COMPANY.**

BY order of the Master of the Rolls, the following case was stated for the opinion of this Court:

The 33 Geo. 3, c. lxxx. incorporated a Company for making

a navigable canal, and enacted, "that before any of the brooks, streams, rivulets, waters, water-courses, or springs, which supplied the rivers Gade or Bulbourne, should be taken for the purposes of the canal, a reservoir should be made for collecting flood-waters, sufficient to supply such rivers with a quantity of water at least equal to what should be taken from the said rivers, brooks, streams, &c. for the use of the intended canal; and that, whenever there should be a want of water in such rivers, for the supply of any mill thereon, a person appointed for that purpose should, at the instance of the occupier of the mill, let off from the reservoir and convey to such river, a supply of water equal at least to the quantity taken above the mill for the use of the canal. provided that, when a sufficient quantity of flood-waters could not be collected for serving the mills with a quantity of water equal at least to what should be taken from them for the use of the canal, the Company should thenceforth cease to take any of the waters of the said rivers, or of the brooks, streams, rivulets, waters, watercourses, or springs which then supplied the same, or any part thereof, for any purpose whatsoever." By agreement under seal of the 11th of September, 1817, between the Company and the plaintiffs, (who were owners of two ancient mills situate below the junction of the rivers Bulbourne and Gade), after reciting that there had been disputes between the Company and the plaintiffs respecting the subtraction of water from their mills by the said canal, and that, upon mature deliberation, it was admitted by all parties that full security could be obtained for the mills, and an end put to disputes, without the aid of reservoirs, by varying the course of the canal in a track therein referred to, the Company covenanted to endeavour to procure an Act of Parliament to authorise the deviations; and also, that they would not, at any time, make any other alteration in the state of communication between the canal and the rivers Gade and Bulbourne above the higher mill of the plaintiffs, or any diversion of the waters of those rivers, but that the same should continue as then existing. The 58 Geo. 3, c. xvi. accordingly passed, whereby the Company were empowered to vary the line of canal; but it was enacted, that they should not make any alteration in the state of communication between the canal and the rivers Gade and Bulbourne, nor divert any of the waters of the said rivers in any other manner than diverted at the time of the passing of that Act. In the year 1849, the Company sunk a well on their own land, and erected over it a pump and steam-engine, by which they pumped into their summit level a quantity of under-ground water, which would otherwise have flowed under ground into the river Bulbourne, and paid a quantity of under-ground water, which would

The plaintiffs have for some time past carried on, and now carry on, business in partnership as paper manufacturers, and for the purposes of such business occupy certain mills, called Apsley Mill, Nash Mill, Home Park Mill, and Croxley Mill, situate in the parishes of King's Langley, Abbott's Langley, and Rickmansworth, in the county of Hertford.

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The rivers Bulbourne and Gade, after uniting together into one river (the Gade), at a place called Two-Waters, in the parish of Hemel Hempstead, in the said county, have, for upwards of twenty years last past, and from a period anterior to the 11th of September, 1817, continually to the present time, run and flowed to the said mills in succession, for the purpose of supplying the said mills in succession with water for the working thereof. And the plaintiffs, for upwards of twenty years before and at the time of the digging of the well hereinafter mentioned, had and enjoyed and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the waters of the said rivers, for supplying the said mills with the water for the working thereof.

The Company of Proprietors of the Grand Junction Canal were incorporated by the 33 Geo. 3, c. lxxx., intituled "An Act for making and maintaining a navigable Canal from the Oxford Canal Navigation at Braunston, in the county of Northampton, to join the river Thames at or near Brentford, in the county of Middlesex; and also certain Collateral Cuts from the said intended Canal."

By the 9th section of that Act, the said Company were authorised to make and complete the said canal and collateral cuts, and to supply the said canal and collateral cuts, whilst making, and for all times for ever after the same should be made, with water from all such brooks, springs, streams, rivulets, rivers, waters, and watercourses, which were and should flow or be found in digging or making the said canal and collateral cuts respectively, or within the dis-

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tance of five miles from either or each of the two head levels of the said intended navigation, at or near Braunston and Marsworth aforesaid, respectively, and within the distance of three miles from any other part of the said canal, and the several collateral cuts or any of them, or from any reservoir or reservoirs which should belong thereto. And by the 35th section it was provided that, before any of the brooks, streams, rivulets, waters, watercourses, or springs, which then supplied the rivers or streams of Gade or Colne, or the Berkhamstead river, called Bulbourne, or any of the streams or cuts which are formed out of or communicate with such rivers or streams or any of them, should be taken or used for the use or supply of the intended canal, and before the said rivers or streams of the Gade, the Colne, or the Bulbourne, or such other streams or cuts, should be diminished by means thereof, the commissioners therein mentioned should and they were thereby authorised and required to set out, in some place or places as near to the line of the intended canal, and to such brooks, streams, rivulets, waters, watercourses, or springs respectively, as they should judge most proper and convenient, a piece or pieces of land for the making and forming a reservoir or reservoirs for the collecting flood-waters sufficient to supply such rivers, streams, and cuts, with a quantity of water equal at least to what

that whenever there should be a want of water in any of the said rivers, streams, or cuts, for the use or supply of any mill or mills thereon, it should be lawful for the person who should be appointed as thereafter mentioned by the majority of the mill occupiers who might be affected thereby, and he was thereby empowered and directed, at the instance of the occupiers of such mill or mills, to let off from such reservoir or reservoirs, and to convey to any such river, stream, or cuts, by means of such aqueducts or feeders above such mill or mills, such supply of water as should be equal at least to the quantity taken from such river, stream, or cut above such mill, for the use or supply of the said canal: Provided that, in case a sufficient quantity of flood-waters could not be collected and obtained to answer the purposes aforesaid, at all times and seasons of the year, then whenever and as soon as it should appear that such a sufficient quantity of flood-waters could not at all times be collected and retained, for the purpose of constantly supplying such rivers, streams, or cuts, and serving such mills with a quantity of water, equal at least to what should be taken from them for the use and supply of the intended canal, the said Company should not at any time thereafter take or use, or have any further communication with, any of the waters of the said rivers, streams, or cuts, or either of them, or with the brooks, streams, rivulets, waters, watercourses, or springs, which then supplied the said rivers, streams, or cuts, for any purpose whatsoever relating to the intended canal, but should from thenceforth absolutely cease to take and cause to be taken or used the said waters, or any part thereof, for any purposes whatsoever relating thereto, except it were the waste waters only thereof, after the same were discharged from the said rivers, streams, or cuts, anything in this Act contained to the contrary thereof in anywise notwithstanding."

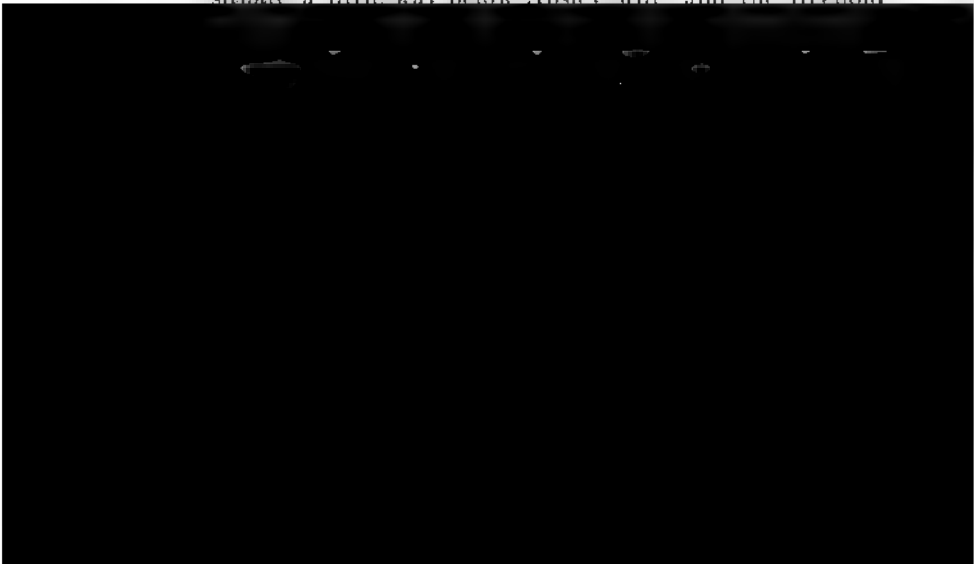
The Grand Junction Canal, authorised by this Act, was constructed and opened for traffic in the year 1798. The

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end next to London of the summit or head level of the canal near Marsworth, is at a place called Cow Roast, which is near Tring, and is also near the source of the Bulbourne river, and the said summit level extends from Cow Roast for about three miles in a north-westerly direction. From Cow Roast, the canal descends towards the Thames and Paddington, and it runs incorporated for the most part with the Bulbourne to Two-Waters, and from Two-Waters it runs incorporated for the most part with the Bulbourne and Gade to Rickmansworth, and from Rickmansworth it runs incorporated for the most part with the Bulbourne and Gade and Colne to Cowley Lock, near Uxbridge, where it leaves the said rivers, and runs into the Thames at Brentford. The summit level of the canal at Cow Roast is about 1100 feet above the level of the Thames at London Bridge, and the ascent to the Cow Roast level is accomplished by fifty-six locks or steps in the navigation.

Apsley Mill, one of the mills occupied by the plaintiffs, is situated a little way below the junction of the Bulbourne and the Gade at Two-Waters, and the freehold and inheritance thereof was purchased by the plaintiff John Dickinson in the year 1809; and the said mill is and was at the time of the purchase thereof an ancient mill. Nash Mill, another of the mills occupied by the plaintiffs, is situate a little way below Apsley Mill, and the freehold



authorising the making of the said canal, and particularly the 35th section as to the construction of a reservoir; and reciting that the Company had made and completed the canal, but had not fully complied with the provisions of the recited Act so far as related to the mills called Apsley Mill and Nash Mill; and reciting, that disputes and differences had for several years subsisted between the said parties thereto, and actions had been brought respecting the subtraction of water by means of the said canal from Apsley Mill and Nash Mill; and that, upon mature deliberation, it had been admitted by all the parties thereto, that full security could be obtained for the said mills, and an end put to such disputes and differences, without the aid of reservoirs, as directed by the recited Act, by varying the course of part of the said canal between Two-Waters and the tail-water of Nash Mill, and by such other means as hereinafter mentioned; and reciting, that it had been agreed by and between the parties thereto, that, in consideration of the covenants and agreements hereinafter entered into by the Company to make the said deviation in manner hereinafter mentioned, and for other considerations, they the said J. Dickinson and G. Longman, and all other necessary parties, should sign and execute all such matters and things, devices, conveyances, and assurances, as by counsel should be deemed advisable, to put an end to and prevent all further claims, disputes, and differences relating to the supply of water to Apsley Mill and Nash Mill, or either of them, or to any other mill which might hereafter be erected between Two-Waters and the southward end of the said deviation: It is (amongst other things) witnessed, that in consideration of the premises, and also in consideration of the covenants, articles, and agreements hereinafter contained, and on the parts and behalves of J. Dickinson and G. Longman to be kept, done, and performed, they the said Company covenanted and

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agreed to and with J. Dickinson and G. Longman, their heirs, &c., in manner following (that is to say):—First, that the Company would, in the next Session of Parliament, apply for and do all that in them lay to obtain an Act of Parliament to enable them, within the space of twelve calendar months from the passing of the said Act, at their own costs and expenses, to make and complete, and for ever afterwards to maintain and keep in repair, a deviation in the line of the said canal as thereafter mentioned. Secondly, that when and so soon as the said deviation should be completed and used for navigation, the Company would stop and thenceforth discontinue the navigation of the canal, from 330 yards south of Frogmore Swing Bridge to the junction of the canal and river below the Four Locks, in the parish of Abbott's Langley; and that they the said Company should not nor would, at any time thereafter, make any other alteration in the state of communication between the canal and the rivers Gade and Bulbourne above Nash Mill, or any diversion of the waters of those rivers, but the same should continue as at the then present time existing.

This agreement was followed by the 58 Geo. 3, c. xvi., intituled "An Act to enable the Grand Junction Canal Company to vary the Line of part of their Canal in the County of Hertford, and for altering and enlarging the

united rivers Bulbourne and Gade, in the parish of Abbott's Langley, into the canal and rivers above Nash Mill, and above three other mills on the said united rivers; and that the Company had also made and worked side pounds at each of the four locks on the canal next Nash Mill, for the purpose of diminishing the consumption of water thereat from the said united rivers; and that disputes had for several years subsisted between the Company and the owners and occupiers of Apsley Mill and Nash Mill respecting the subtraction of water, by means of the said canal, from the said two mills, and the inadequacy of the supply afforded by the said engine and side pounds, to compensate for such subtraction, and leakage, and evaporation, and the want of such reservoir to supply the same; the Company were empowered to vary the line of canal as in the agreement mentioned; but it was thereby enacted, that it should not be lawful for the Company, upon any account or pretence whatever, to make any alteration in the state of communication between the said canal and the rivers Gade and Bulbourne, northward of Nash Mill, other than as authorised by the said Act, nor to divert any of the waters of the said rivers, or either of them, in any other manner than is diverted at the time of passing the said Act. And by the said Act the clauses respecting the said reservoirs in the original Act were repealed.

The deviation and alterations in the canal contemplated by the articles of agreement and Act of Parliament last mentioned were duly made. No diversion or diminution of the waters of the rivers Bulbourne and Gade, or any of them, by means of a well sunk in their neighbourhood, and pumping thereout, as hereinafter mentioned, had ever been made by the Company at or before the time of the making of the said agreement and the passing of the 58 Geo. 3, c. xvi.

In the year 1824, the plaintiff John Dickinson built the mill called Home Park Mill, and, in 1828, the mill called

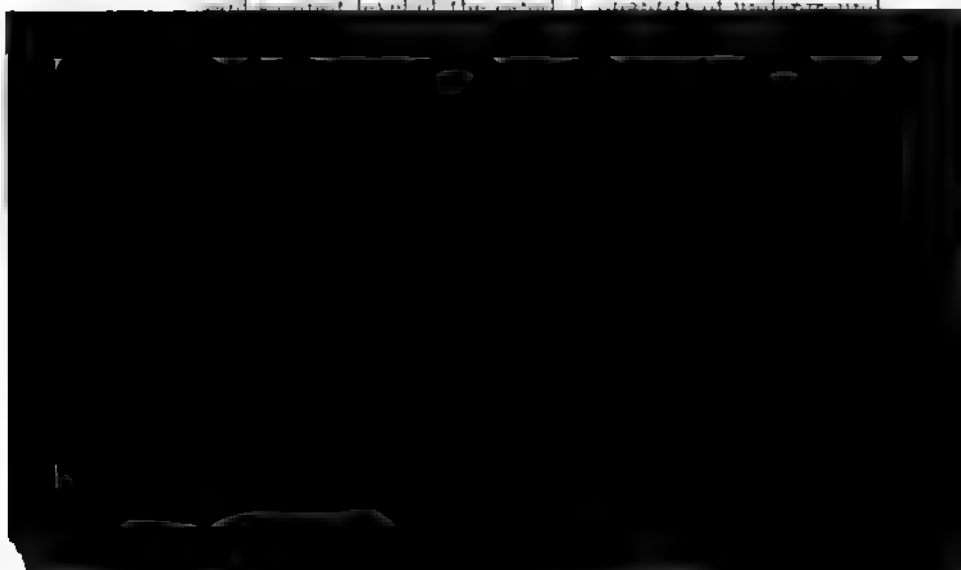
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Croxley Mill: both of which mills are situate on the united rivers Bulbourne and Gade, south of Nash Mill, and of the lower or southern end of the deviation authorised by the 58 Geo. 3, c. xvi.; and the said two mills so built are now occupied by the plaintiffs, and are, and ever since the building thereof have, as of right and without interruption, been worked by means of the waters of the said rivers.

In the year 1849, the Company sunk and excavated a large well at Cow Roast, in their own ground, close to the east bank of the canal, and close to, but below, the southern end of the summit level. This well was sunk for the purpose of adding to the supply of water in the summit level of the canal. With this object the well has been excavated to the depth of seventy-two feet, and the Company have erected in and over it pumps and a steam-engine, and have by means thereof pumped into the said summit level north of Cow Roast Lock large quantities of water which collected into the well below the surface of the ground.

It is admitted, for the purposes of this case, that the Company, by digging the well at Cow Roast, and pumping the water thereout, have diverted and prevented from flowing into the river Bulbourne, and pumped into the said summit level of the canal, a quantity of water, and



water, the plaintiffs have been prevented from working their said mills so beneficially as they otherwise might and could and would have done; and that, by the digging of the said well at Cow Roast, and the pumping thereout by the Company, a portion of the water of the river Bulbourne, which would, in the usual and natural course of the river, have flowed to the mills of the plaintiffs, and been applicable to the working thereof, is drawn off, through the intervening chalk and earth, out of the said river into the said well, and pumped into the summit level of the canal, and by means thereof the plaintiffs have been prevented from working their mills so beneficially as they otherwise might and could and would have done.

The questions for the opinion of the Court are—First: Whether the Company, by digging the said well at Cow Roast, and pumping the water thereout, and thereby diverting and preventing from flowing into the river Bulbourne, and pumping into the said summit level of the canal, a quantity of under-ground water, which, in the natural and accustomed course of such water, anterior to and at and ever since the 11th of September, 1817, would have flowed under ground into the river Bulbourne, and which water would, in the natural and accustomed course of the rivers Bulbourne and Gade, have flowed to the mills of the plaintiffs, and been applicable to the working thereof, and have thereby prevented the plaintiffs from working their mills so beneficially as they otherwise might and could and would have done, have violated the 58 Geo. 3, c. xvi., and the articles of agreement of the 11th of September, 1817, or either and which of them, or have rendered themselves liable to an action, irrespective of the said Act of Parliament and agreement.

Secondly: Whether the Company, by digging the said well at Cow Roast, and pumping the water thereout, and thereby diverting and preventing from flowing into the river Bulbourne, and pumping into the said summit level

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of the canal, a quantity of under-ground water, which would otherwise have percolated and gone through the intervening chalk and earth under ground, and would, in the natural and accustomed course of the rivers Bulbourne and Gade, have flowed to the mills of the plaintiffs and been applicable to the working thereof, and have thereby prevented the plaintiffs from working their mills so beneficially as they otherwise might and could and would have done, have violated the 55 Geo. 3. c. xvi. or the articles of agreement of the 11th of September, 1817, or either and which of them, or have rendered themselves liable to an action, irrespective of the said Act of Parliament and agreement.

Thirdly: Whether the digging of the said well at Cow Roast, and the pumping thereof by the Company, so as to draw off out of the river Bulbourne, through the intervening chalk and earth into the said well, and pumping into the said summit level of the canal, a portion of the water of the river Bulbourne, which would in the usual and natural course of the river have flowed to the mills of the plaintiffs, and been applicable to the working thereof, whereby the plaintiffs have been prevented from working their mills so beneficially as they otherwise might and could and would have done, are a violation of the 58 Geo. 3. c. xvi. and the articles of agreement of the 11th of Sep-

Peacock (*Cairns* with him) argued for the plaintiffs in last Michaelmas Term (Nov. 17).—It is proposed to consider, first, what are the rights of the plaintiffs at common law; and secondly, whether those rights are in any way affected by the statute or agreement. By twenty years' uninterrupted enjoyment, the plaintiffs have acquired the right to a flow of water from the rivers Bulbourne and Gade, for working their mills; and the only question is, whether they are entitled to be supplied by the underground stream. The right of a riparian proprietor to water flowing on the surface is settled by the cases of *Wood v. Waud* (a), and *Embrey v. Owen* (b); but there is no authority which determines his right in respect of subterranean water which supplies the surface stream. It is true that, in *Acton v. Blundell* (c), it was held that the owner of land, through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a neighbouring proprietor, who, in carrying on mining operations in his own land in the usual manner, causes the well of the former to become dry. But that case is distinguishable from the present, inasmuch as there the plaintiff had enjoyed the benefit of the under-ground water for less than twenty years, and the defendant merely excavated his own soil in the ordinary and reasonable use of it. Here the defendants have sunk a well, not for the enjoyment of their land, but for a purpose wholly foreign to it, namely, the pumping away the water to supply a canal. If they are entitled to do that, any private individual might purchase a small portion of land, and by sinking a well, and pumping the water for the purpose of selling it, might stop all the neighbouring streams. The same rule of law will apply to subterranean as to surface water. A landowner is entitled, *jure naturæ*, to the use of all water which flows in its natural course

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(a) 3 Exch. 748.

(b) 6 Exch. 353.

(c) 12 M. & W. 324.

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through his land, and a neighbouring proprietor cannot deprive him of it unless the latter has acquired some right by grant or otherwise. Assuming that he may sink a well for the purpose of cultivating his land, or getting coals or minerals, and thereby drain his neighbour's well, he clearly cannot do so for a purpose wholly unconnected with the ordinary use of the soil. The true principle is found in the Digest, lib. 39, tit. 3 (a), *De aquâ, et aquæ pluviz arcendæ*: Art. 1, iii. "Denique Marcellus scribit, cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi: nec de dolo: et sane actionem non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit." Here the plaintiffs have acquired a right by user. In *Balston v. Bensted* (b), Lord *Ellenborough*, C. J., ruled that, after twenty years' uninterrupted enjoyment of a spring of water, an absolute right to it is gained by the occupier of the close in which it issues *above ground*, and the owner of an adjoining close cannot lawfully cut a drain whereby the supply of water to the spring is diminished.

Such being the right of the plaintiffs at common law, it is submitted that it is not affected by the statutes or agreement. The 33 Geo. 3, c. lxxx. incorporates the Company for the purpose of making a canal. By section 9, they are authorised to supply the canal with water "from all such brooks, springs, streams, rivulets, rivers, waters, and water

of water, equal, at least, to what shall be taken for the intended canal. The power of the Company to purchase land is derived from that Act, and the legislature never intended that they should use the land in a manner wholly unauthorised by it. A Company incorporated for making a railway could not purchase land under the compulsory clauses of the 8 & 9 Vict. c. 18, and use it for a purpose different from that which their special Act authorised. The principle applicable to the construction of statutes of this description, is thus stated by Lord *Eldon*, C., in *Blakemore v. The Glamorganshire Canal Navigation* (a): "I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else: that they shall do and forbear all that they are required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals."

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Crompton for the defendants (*Blackburn* with him).—First, have the plaintiffs any right at common law to restrain the defendants from excavating their own soil, so that the under-ground stream may not be prevented from percolating the earth, and flowing into the river *Bulbourne*? It is submitted that they have not. The defendants are entitled, as owners of the soil, to use the under-ground water, and the plaintiffs cannot impose upon them a servitude "quod non facias." The law as to under-ground water is perfectly different from that which regulates the right to surface streams. The difference arises from the geological uncertainty as to the existence and course of subterranean waters, and the difficulty of ascertaining the exact extent to which one person's land is affected by an excavation on another's. For those rea-

(a) 1 My. & K. 154.

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sons, in the case of under-ground water, there can be no general presumption of law, or particular presumption of a grant, so as to impose a servitude or easement. Upon such principles *Acton v. Blundell* (a) was decided, and the whole reasoning in that case is applicable to the present. *Balston v. Bensted* (b) was merely a Nisi Prius decision, and must be considered as overruled by *Acton v. Blundell*. Indeed, as is observed in *Gale on Easements* (c), the proposition laid down by Lord *Ellenborough* in that case appears to include, under the same general rule, watercourses of all descriptions, whether the stream flows in the ordinary manner above ground, or only emerges, after having made its way through the adjoining land below the surface of the earth. But *Tindal*, C. J., in delivering the judgment of the Court in *Acton v. Blundell*, says, "We think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law." A well itself is a disturbance of the natural state of things. *Tindal*, C. J., in delivering the same judg-

water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives; on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all." *Cooper v. Barber* (a) is also an authority to shew that no right can be acquired by user of percolating water. The passage cited from the Digest supports this view. Its meaning is, that a person who digs a well in his own land, and thereby diverts the stream of his neighbour, is not liable to an action, unless he does it maliciously. So, in the Digest, lib. 39, tit. iii. art. 21, iii. (b): "Si in meo aqua erumpat, quæ ex tuo fundo venas habeat; si eas venas incideris, et ob id desierit ad me aqua pervenire, tu non videris vi fecisse, si nulla servitus mihi eo nomine debita fuerit: nec interdicto quod vi aut clam teneris." Again, in the Digest, lib. 39, tit. ii. Art. 1, xi. (c) "De Damno Infecto. Hoc docet Ulpianus: Item videamus, quando damnum dari videatur: Stipulatio enim hoc continet, quod vitio ædium, loci, operis, damnum fit: Ut puta in domo mea puteum aperio, quo aperto venæ putei [tui] præcisæ sunt: an tenerar? Ait Trebatius, non teneri me damni infecti; neque enim existimari operis mei vitio damnum tibi dari in ea re, in qua jure meo usus sum. Si tamen tam alte fodiam in meo, ut paries tuus stare non possit, damni infecti stipulatio committetur." In *Smith v. Kenrick* (d), *Maule, J.*, after observing that the law upon the subject of subterranean rights was much discussed in *Acton v. Blundell*, says—"The distinction between subterranean and surface rights seems to be this:—As to surface flows, parties acquire rights to them because there is the acquiescence of every body who has any interest in the matter. But, as to un-

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(a) 3 Taunt. 99.

(b) Pothier's edit. Vol. 3, p. 578.


(c) Pothier's edit., Vol. 3, p. 566.

(d) 7 C. B. 515.

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der-ground percolations, no rights are gained, because nobody knows anything about them." In using the water, there is nothing to confine the owner of the soil to any particular purposes. Then, is there any difference with respect to the water which *flowed* under ground into the river Bulbourne? It is submitted, that the plaintiffs have no right to a negative easement of that kind over the defendants' land,—neither have they a right to require the defendants to keep the intervening chalk in such a state as to prevent the water of the river from percolating through it into the well. At all events, assuming that the plaintiffs could establish such a negative easement, their right being merely to have the water for working their mills, no action will lie, unless they are prevented from working them so beneficially as they otherwise might have done.

Then, do the statutes or agreement alter the case? The statutes neither give to the plaintiffs any additional rights, nor take from the defendants any rights which they possessed at common law. The matters to which they are applicable are fully recited, and their object, with that of the agreement, is merely to sanction the deviation in the course of the canal. *Blakemore v. The Glamorganshire Canal Company* (a) is distinguishable, for there the private Act of the Company defined their rights in respect of the



The other passages cited from the Digest are to this effect—that a person may not sink a well so as to injure his neighbour, unless it be in the ordinary and proper use of his own land. The plaintiffs having a positive right to a watercourse, the defendants would not be justified in digging a tunnel beneath their own land, and so injuring the plaintiffs' right. Then, how are they entitled to cut off the stream? The statutes give them no authority to do so, and their powers are confined to the purposes therein mentioned. Though the plaintiffs might not be prevented by the defendants from working their mills so beneficially, nevertheless an action will lie, for it is an infringement of a right, and the defendants, by twenty years' user, might establish a right in themselves to the easement.

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Cur. adv. vult.

The judgment of the Court was now delivered by—

POLLOCK, C. B.—This case was sent for our opinion by the Master of the Rolls. [His Lordship stated the substance of the case, and proceeded:] His Honour has been pleased to ask six different questions, on which we shall certify our opinion in favour of the plaintiffs, and against the Company; and according to the practice which this Court has adopted for several years past, we proceed to state our reasons for the opinion which we give.

Questions of rights to flowing water have been much discussed in modern times in several cases, *Mason v. Hill* (a), *Wood v. Waud* (b), *Embrey v. Owen* (c), and placed on their proper foundation. We consider it as settled law, that the right to have a stream running in its natural course is, not by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*: *Shury v. Piggot* (d), *Tyler v. Wilkin-*

(a) 5 B. & Ad. 1.

(b) 3 Exch. 748.

(c) 6 Exch. 353.

(d) 3 Bulst. 339.

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son (a); and an incident of property, as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighbouring proprietor, who cannot dig so as to deprive it of the support of his land. But in the much considered case of *Acton v. Blundell* (b), in the Court of Exchequer Chamber, a distinction is made for the first time between under-ground waters and those which flow on the surface; and it was held, that the owner of a piece of land, who has made a well in it, and thereby enjoyed the benefit of under-ground water, but for less than twenty years, has no right of action against a neighbouring proprietor, who, in sinking for and getting coals from his soil in the usual and proper manner, causes the well to become dry. The decision goes no further. In such a case the existence and state of under-ground water is generally unknown before the well is made; and after it is made there is a difficulty in knowing certainly how much, if any indeed, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to that of his neighbour, who, in digging a mine or another well, may possibly be only taking back his own. These practical uncertainties make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters, and to call

stream were well known, as is the case with many, which sink under ground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground. When, however, the springs come to the surface and form streams and rivers, the established rules apply, that each riparian owner is entitled, not to the property in the flowing water, but the usufruct of its stream for all reasonable purposes, to drink, to water his cattle, or to turn his mills, according to the nature and situation of the stream. Each such owner therefore has a remedy for the infringement of this right. If then the stream is diverted by altering its course, or cutting down its banks, or the water abstracted from it for unauthorised purposes, the owner has his right of action against the wrong doer.

In the present case, the water is proved to have been taken from the river after it formed part of its stream, not by the reasonable use of it by another riparian proprietor, but by the digging of a well, which is clearly a diversion; and an action will lie at common law against the Company for the injury which has resulted from that unauthorised act to the known right of the mill-owners. If, indeed, it had appeared that the Company were ignorant, and could not by any degree of care have ascertained, before making the well, that it would have the effect of abstracting the water, and when they discovered that it did, could not have repaired the mischief, it might have raised a question whether the action was maintainable; but this point is not suggested in the case, and it would be immaterial for the decision of the principal question in the case before the Master of the Rolls, as will appear from our answer to a subsequent question.

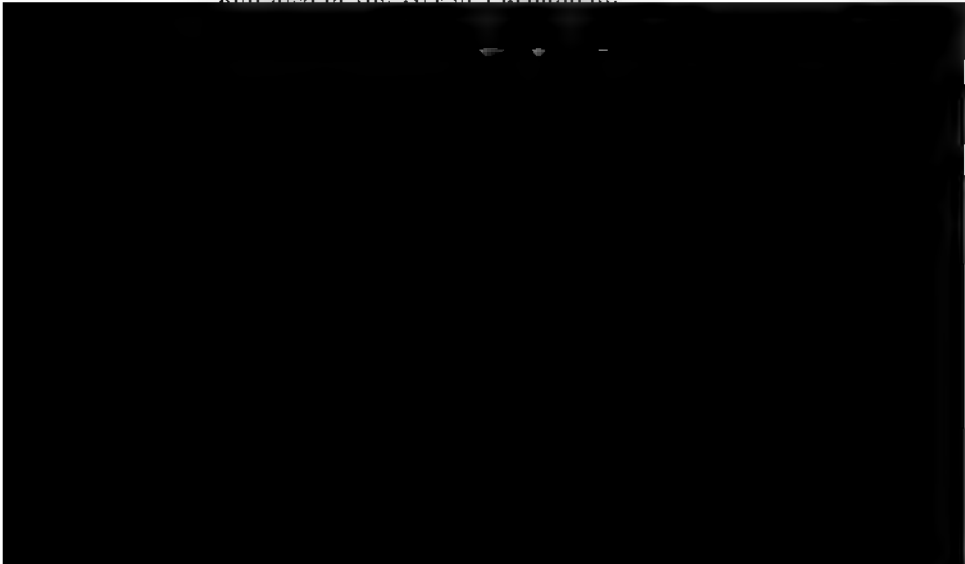
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With respect, then, to the right of action of the mill-owners, at common law, against the Company, for abstracting water which actually had formed a part of the stream of the rivers Gade and Bulbourne by sinking the well, we think that the Company are liable for sinking the well.

As to the abstraction of the water which never did form part of the rivers, but has been prevented from doing so in its natural course, by the excavation of the well, whether the water was part of an under-ground watercourse or percolated through the strata, we are also of opinion that an action would lie. The mill-owners were entitled to the benefit of the stream in its natural course; and they are deprived of part of that benefit if the natural supply of the stream is taken away.

The remaining questions are, whether the sinking of the well and the consequent abstracting of the water of the rivers, and the waters and springs supplying it, is a breach of agreement between the mill-owners and the company, of the 11th of September, 1817, or of the obligation imposed on the Company by the Act of 58 Geo. 3, c. xvi. We are of opinion that the taking away the water of the rivers, or the supply of the rivers from springs and percolations, by means of the well, is a breach of the agreement and also of the Act of Parliament.



at least equal to what should be taken from the said rivers, brooks, streams, cuts, rivulets, waters, watercourses, or springs, for the use of the canal; and that whenever there should be a want of water in any of the said rivers, streams, or cuts, for the use or supply of any mill or mills thereon, it should be lawful for the person who should be appointed as thereafter mentioned, and he was thereby empowered and directed, at the instance of the occupiers of such mill or mills, to let off from any such reservoir, and to convey to any such river, stream, or cuts, by means of such aqueducts or feeders above such mill or mills, such supply of water as should be *equal at least to the quantity taken from such river, stream, or cut, above such mill*, for the use or supply of the said canal: provided also, that in case a sufficient quantity of flood-waters could not be collected and obtained to answer the purposes aforesaid, at all times and seasons of the year, then whenever and as soon as it should appear that such a sufficient quantity of flood-waters could not at all times be collected and retained, for the purpose of constantly supplying such rivers, streams, or cuts, and serving such mills with a quantity of water equal at least to what *should be taken from them* for the use and supply of the said intended canal, the said Company of proprietors should not, at any time thereafter, take or use or have any further communication with any of the waters of the said rivers, streams, or cuts, or either of them, or with the brooks, streams, rivulets, *waters*, watercourses, or *springs*, which then supplied the said rivers, streams, or cuts, for any purposes whatsoever relating to the said intended canal, but should from thenceforth absolutely cease to take and cause to be taken or used the said waters, *or any part* thereof, for any purposes whatsoever relating thereto, except it were the waste waters only thereof, after the same were discharged from the said rivers, streams, or cuts, anything in the said Act contained to the contrary thereof in anywise notwithstanding-

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ing. The agreement then recites that there had been disputes between the mill-owners and the Company; and that upon mature deliberation it was admitted, that full security could be obtained for the mills, and an end put to disputes, by varying the course of the canal in a tract therein referred to; and the agreement contains a covenant by the Company to endeavour to procure an Act to authorise the deviation, and also a covenant that the Company should not at any time make any other alteration in the state of communication between the canal and the said rivers Gade and Bulbourne above the higher mill, or any *diversion of the waters* of those rivers, but *the same shall continue as at present existing.*

It appears to us to be clear, that the meaning of the agreement was, that the mill-owners should have the benefit of all the waters of the Gade and Bulbourne, and of *the waters or springs that supply those rivers*, as they existed at the date of it. They were entitled under the original Act, 33 Geo. 3, c. lxxx., to have that quantity provided by a reservoir; and when the reservoir is, by mutual consent, done away with, so that there is no supply to be provided equal to what should be taken from the rivers or the waters or springs supplying these, and there is a stipulation that no diversion of the waters of the rivers should be



could neither have foreseen the injury to the mill-owners nor repaired it, they were bound by their covenant not to diminish the supply. If they did, no matter what was the care they took, it was an absolute engagement, and they are liable.

The terms of the Act of Parliament, 58 Geo. 3, c. xvi. which prohibit the Company from making a diversion of the waters of the rivers Gade and Bulbourne, are not so clear. They are only bound by the Act not to divert *any of the waters of the said rivers*, or either of them, in any other manner than as diverted at the time of the Act. But we think that the same construction ought to be put on these words as those used in the agreement, and that the meaning was, that the rivers should be left with the same quantity of water, so far as the acts of the Company were concerned. This, however, we apprehend to be an immaterial point, as the obligation imposed by the covenant on the Company must still remain, for it never could be the intention of the legislature to alter it by the 58 Geo. 3.

One other observation only remains to be made, viz. that as the mill-owners are entitled to sue the Company for a breach of their agreement, by diminishing the water of the rivers, actual loss of profit by being unable to work the mills as before is not necessary to enable the owners to recover, nor is it if the Company was not authorised to make the well at common law: *Embrey v. Owen*.

We therefore answer the several questions of the Master of the Rolls in favour of the plaintiffs.

A certificate, in conformity with the above opinion, was afterwards sent to the Master of the Rolls.

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GAVIN v. ALLAN.

A defendant is not entitled to judgment as in case of a nonsuit, where the plaintiff, after issue joined, has taken the benefit of the Insolvent Act, and inserted in his schedule the debt for which the action is brought, but it does not appear whether the assignees are willing to proceed.

THIS was a rule for judgment as in case of a nonsuit.—Issue was joined on the 22nd of March, 1850; on the 31st of January, 1851, the plaintiff was discharged under the Insolvent Debtors Act. The debt for which this action was brought was inserted in his schedule; but it did not appear from the affidavits, whether the assignees were willing to proceed, or whether any application had been made to them.

S. Temple shewed cause.—The plaintiff ought not to be compelled to proceed, since he has no longer any interest in the action, which is now vested in his assignees. No application has been made to the assignees, and the defendant should be left to take down the cause by proviso. *Taylor v. Montague* (a) and *Frodsham v. Rust* (b) will be relied upon in support of the rule; but in the former case the assignees had refused to proceed with the action, and the latter is at variance with *Cross v. Robertson* (c), where, the plaintiff having become bankrupt after issue joined, the Court discharged the rule for judgment as in case of a nonsuit and refused to direct a *stet* processus.

fuse to proceed, the Court will insist upon a peremptory undertaking and security for costs.] That case was not referred to in *Cross v. Robertson*. The 14 Geo. 2, c. 17, s. 1, has given to every defendant a right to compel the plaintiff to proceed according to the course and practice of the Court; and if, in this case, the plaintiff's excuse is that the assignees have interfered, it is incumbent on him to shew that fact.

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The Court having suggested that a *stet processus* should be entered, both parties consented, and a rule was drawn up accordingly.

BRETTELL v. DAWES.

Jan. 27.

THIS was a rule calling on the plaintiff to shew cause why all proceedings on the judgment recovered in this action should not be stayed until after proof, or exhibiting or making such proof as the plaintiff might be able, of his debt or demand, before the Master in Chancery to whom the winding up of the affairs of the Pennant and Cragven Consolidated Lead Mining Company had been referred, pursuant to the Joint Stock Companies Winding-up Act, 11 & 12 Vict. c. 45.

It appeared from the affidavits, that the Company was formed in the year 1848, and that this action was commenced in June, 1851, against the defendant, who was a shareholder in the Company, to recover the price of goods sold by the plaintiff to the Company. Notice of trial was given for the 13th of November; but on the 7th, the defendant consented to a Judge's order to stay proceedings on payment of debt and costs on the 15th of December, and in default thereof the plaintiff to be at liberty to sign final judgment and issue execution. On the 15th of December, the plaintiff was served with notice that an order had

Under the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45, an "interim manager" is a distinct officer from the "official manager;" and therefore the 73rd section of that Act, which empowers the Court, after the first appointment of an official manager, to stay proceedings in certain actions until after proof before the Master, does not apply where an interim manager only has been appointed.

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been obtained under the 11 & 12 Vict. c. 45, for winding-up the affairs of the Company, and that an interim manager was appointed. The debt and costs not having been paid, the plaintiff signed final judgment on the 16th of December, and on the 17th issued a fi. fa., under which the sheriff levied on the same day. Before the goods were sold, a summons was taken out to stay proceedings; and *Martin, B.*, ordered that the amount of the execution be paid into Court to abide the event of the present rule.

B. C. Robinson shewed cause.—First, the Court has no jurisdiction to stay proceedings under the 73rd (a) section of the 11 & 12 Vict. c. 45, because no official manager has been appointed. It will be argued, however, that an interim manager is, for this purpose, an official manager; but the whole tenor of the statute shews that he fills a totally distinct character. His powers and duties are defined by the 20th section (b). He is appointed by the Master, who is

(a) Enacts, "That, after the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official

such proof shall have been made or exhibited before the Master."

(b) Enacts, "That in the meantime, and until an official manager shall be appointed as hereinafter mentioned, and from time to time when there shall be no

the sole judge of the necessity or expediency of so doing, and his authority is limited to the preservation and secu-

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pointed shall thereupon have and exercise all such and the like powers and authorities as are usually given to and are had and exercised by receivers appointed by the Court in a suit duly instituted, together with all such powers and authorities as might be had and exercised by any official manager to be appointed under this Act, except so far as the Master shall otherwise direct in any particular case; and the person so to be appointed interim or provisional manager shall act in all things under the direction of the Master, in collecting and receiving and afterwards disposing of the property, estate, and effects of such company, or such parts thereof as, in order to the preservation and security thereof, shall require to be so collected and received; and it shall be lawful for such interim or provisional manager, acting in that behalf under the direction of the Master to be signified by writing under his hand, to pay and apply any part of the monies, assets, and effects, to be collected, received, or got in by him, in or towards the discharge or satisfaction of any judgment debt which shall have been recovered against such company; and it shall be lawful for the Master to fix the amount and nature of the security to be given and entered into by such interim or provisional manager, and also (if the Master shall think fit) to appoint any person to be interim

or provisional manager without giving or entering into any security; and the security, if any, to be so fixed by the Master, shall accordingly be given and entered into by such interim or provisional manager: Provided, nevertheless, that upon the appointment of an official manager of such company under this Act, all the powers and authorities of such interim or provisional manager shall cease, and the person who shall have been such interim or provisional manager shall, thereupon, deliver up and pay to the official manager all the goods, monies, property, and effects of such company, which shall have come to his hands as such interim or provisional manager as aforesaid, together with all books, papers, and writings in his possession, custody, or power relating thereto, or to the affairs of such company; and it shall be lawful for the Master to make an order, if need be, directing such delivery and payment accordingly, and for vacating any recognisance entered into by such interim or provisional manager and his surety or sureties (if any): Provided also, that no action, suit, or other proceeding shall be instituted or prosecuted by or against any interim or provisional manager, to be appointed as herein mentioned, as representing the company, otherwise than by the style and designation of the official manager of the company; and that every such action, suit, or

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rity of the estate, until an official manager is appointed. On the other hand, public notices are required of the Master's intention to appoint an official manager, and all the contributories are entitled to offer proposals or objections to such appointment: (sect. 21).—It is clear from the 71st section, that no proof of debts was contemplated until after the appointment of an official manager. The 32nd section empowers the Court to allow remuneration to the official manager; and by sections 35 and 36, he alone is to pass accounts before the Master, and keep minutes of proceedings. The 7th section of the Amendment Act, 12 & 13 Vict. c. 108, extends the provisions in those respects, and all the powers and duties of the official manager, to the interim manager. The 41st section provides a remedy for undue delay by the official manager; but there is no means of forcing an interim manager to proceed. The common law right of the subject to sue cannot be taken away, unless by express words or necessary implication: *Prescott v. Hadow* (a). But the 58th section (b) enacts, "that except

other proceeding shall be instituted and prosecuted in the same manner, and with the same effect to all intents and purposes, as if an official manager of the company

der under the same, for the dissolution and winding-up, or for the winding-up of any company, shall extend or enlarge, diminish, prejudice, or in anywise alter or

as is by that Act expressly provided," nothing therein contained shall affect the rights and remedies of creditors.—The second objection to this rule is, that the sheriff has already levied execution, and consequently, quoad the plaintiff, the matter is at an end, and there is nothing for the Court to stay. *Macgregor v. Keily* (a) will perhaps be relied on by the other side; but in that case an official manager had been appointed, and the application, though after judgment, was before the writ of ca. sa. was executed. [*Pollock*, C. B.—I cannot imagine that the statute was intended to apply where judgment has been perfected by execution: it does not say that the plaintiff shall recall his writ.]

Brämwell in support of the rule.—There is no reason why the provisions of the 73rd section should not extend to an interim manager as well as an official manager. They are, in truth, the same officer, the only difference being, that the appointment of the one is permanent, of the other temporary. [*Alderson*, B.—The duties of an interim manager are simply to collect the property and pay judgment debts (sect. 20); the official manager is to make up the books of accounts, sell the estate, wind up the affairs of the Company, pay the debts, and distribute the surplus assets among the parties entitled (sect. 34). Looking, therefore, to their different duties, it is evident that the provisions of the 73rd section are confined to cases in which an official manager is appointed. The interim manager is to act as a receiver, and protect the assets; the official manager is to settle the affairs of the Company. If an interim manager is the same officer as an official manager, why should the legislature say, "that, in the

or with the company, or any person acting on behalf of the same, previously to any such petition, nor any actions, suits, or other

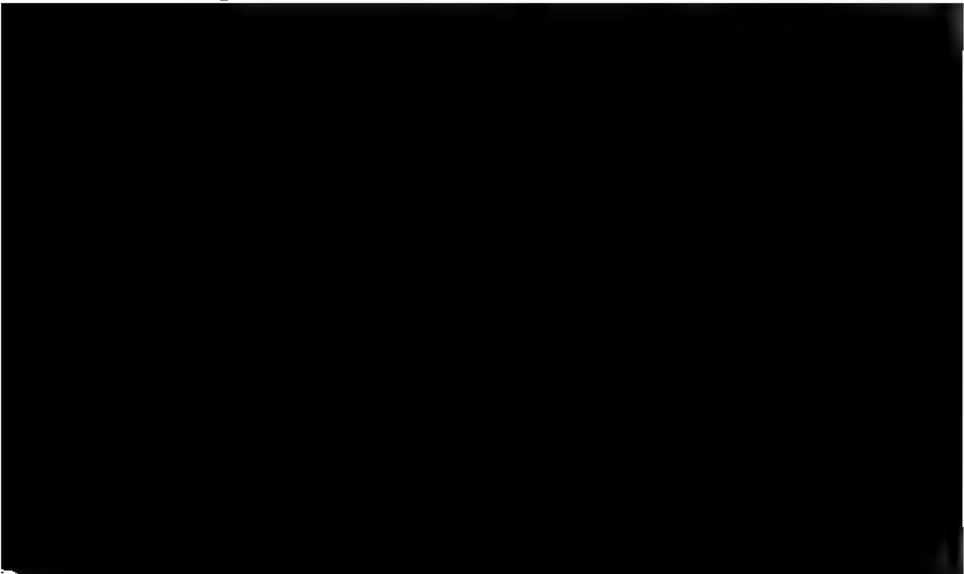
proceedings pending at the date of such petition."

(a) 4 Exch. 801.

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meantime, and until an official manager shall be appointed," the Master may appoint an interim manager. If, indeed, an interim manager were appointed, and then an official manager, and the latter died, the 73rd section would apply, because it says, "after the *first* appointment of an official manager," &c.] The 72nd section shews that the legislature contemplated the proof of debts before the appointment of an official manager, for it directs the Master, within ten days after the order absolute, to advertise for creditors to come in before him; whereas an official manager cannot be appointed until fourteen days after the first advertisement for that purpose. The 20th section provides, that no action shall be brought by or against any interim manager otherwise than by the style and designation of the official manager. That section is explained by the 50th, which enables dissolved companies to sue and be sued in the name of the official manager. Those sections are a legislative interpretation of the meaning of the term "interim manager."—Secondly, the object of the 73rd section was to compel all creditors to prove their debts before the Master, in order that he may ascertain the amount of the claims, and adjust them accordingly; consequently, it is immaterial that the plaintiff has proceeded to judgment. An action is still pending while



is sufficient to dispose of this rule. In truth, it was a doubt on that point which originally induced the Court to grant the rule. Mr. *Bramwell* impressed upon us that "interim manager" was only another name for "official manager;" and some members of the Court entertained sufficient doubt upon the point to render it worthy of consideration. But it having been argued, we are satisfied that there is not so clear an identity between the interim manager and official manager as to prevent the plaintiff from having the benefit of the 58th section, which enacts, that nothing in that Act contained shall affect the rights of creditors, "except as therein expressly provided." It is sufficient to say, that this case is not expressly provided for. The application is founded on the 73rd section, which enacts, that, after the first appointment of an official manager, proceedings shall be stayed until proof before the Master; and it is admitted that here there has been no such appointment. It is enough to say that the construction of the statute is sufficiently doubtful to prevent us from interfering. And as this is an appeal from the decision of a Judge at Chambers, the rule must be discharged with costs.

PARKE, B.—I am entirely of the same opinion. When the motion was made, I certainly felt some doubt whether the term "official manager" might not be construed to include the interim manager, seeing that the 73rd section prohibits proceedings against the official manager until after proof; and by the 20th section an interim manager can only be proceeded against by the style of official manager, and in the same manner and with the same effect as if an official manager were appointed. But, on full consideration, that doubt is removed. It is best to adhere to the ordinary grammatical construction of a statute, unless it leads to an apparent inconsistency or absurdity. The words "official manager" must be understood in the sense

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in which they are previously used, namely, a manager having the entire control over the property of the Company. I concur with the Lord Chief Baron that it is unnecessary to express any opinion on the other point.

ALDERSON, B.—If the goods had been converted into money, there could have been no doubt as to the second point, for then the plaintiff would have ceased to be a creditor. It is not necessary, however, to decide that question. With respect to the main point, I entertain no doubt. There is a broad distinction between an interim manager and an official manager. In the first place, the 20th section says, "that in the meantime, and until an official manager shall be appointed, and from time to time when there shall be no official manager," an "interim or provisional manager of the property, assets, and effects of the Company," may be appointed. That of itself shews a distinction between the two managers, for the one is to be appointed *until* the other is appointed; and if they were identical, "interim" would be a very absurd expression, to say the least of it. Then we find that the interim manager has the property of the Company put into his possession only thus far—he has power to collect debts and satisfy judgments, to prosecute and defend actions brought against the

make out lists of the persons who have claims against the Company, and place them before the Master, who is to wind up the affairs of the Company. These are some of the duties of an official manager as distinguished from those of an interim manager; and this difference of duties shews that, when the legislature speaks of the official manager, it does not mean to include the interim manager. Then, by the 73rd section, when any person has sued a contributory for debts of the Company, the suit is not to be stopped until after the appointment of an official manager, that is, until after the appointment of a person who has those peculiar duties to perform which belong to the official manager. That is the plain sense of the Act of Parliament.

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PLATT, B.—The 58th section says, that, except as by that Act provided, nothing shall alter or affect the rights or remedies of creditors or other persons not being contributories to the Company; then, upon looking to the 73rd section, I find an express enactment concerning the circumstances in which the party is to be placed in order to make the application to stay proceedings, that is, it must be after the first appointment of an official manager. An official manager is a person who has certain defined duties to perform, and as it requires some time to perfect his appointment, it is necessary to appoint some person to protect the property in the meantime. He is called an interim manager, and his duties are quite distinct from those of the official manager; and therefore, when we find an express enactment in the 73rd section, pointing to certain consequences which follow the appointment of an official manager alone, why are we to extend that provision to an interim manager? If the legislature intended to include the interim manager, how easy it would have been to have inserted in that section the words “after the first appoint-

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ment of an *interim* or official manager." The exclusion of those words seems to me to render it clear that the legislature intended the enactment to apply only to an official manager.

Rule discharged, with costs.

Jan. 31.

DOBSON v. BROCKLEBANK.

It is no answer to a motion for judgment as in case of a nonsuit, that the defendant prevented the trial by injunction, which has since been dissolved; at all events, where the plaintiff has subsequently given a fresh notice of trial.

THIS was a rule for judgment as in case of a nonsuit. Issue was joined on the 5th of November, 1850, and notice of trial given on the following day; but, on the 9th of November, the defendant obtained an injunction from the Court of Chancery restraining the trial. On the 12th of June, 1851, the injunction was dissolved; and on the 14th of June, the plaintiff gave a fresh notice of trial, but did not try; and on the 22nd of November he gave another notice, which he countermanded.

Raymond shewed cause (Jan. 24).—Where a defendant has once prevented the plaintiff from proceeding to trial, no subsequent default can arise. The 14 Geo. 2, c. 17, s. 1,

on a peremptory undertaking, "except where the default has been occasioned by some act or some change of circumstances on the part of the defendant, which affords a reasonable excuse to the plaintiff for not proceeding." In Archb. Prac., 8th edit., Vol. 2, p. 1301, it is laid down that the Court "will not grant such leave where the plaintiff was prevented from proceeding by injunction;" and reference is made to an anonymous case (*a*) in Chitty's Reports. That case, however, does not decide the present point, since there the injunction was in force at the time the motion for judgment was made.

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Maynard in support of the rule.—The injunction only suspended the proceedings, and the plaintiff was bound to try in due course after it was dissolved. But, whatever its effect, the plaintiff has committed two new defaults; for each notice of trial was in the nature of a condonation of the defendant's act. The case falls within the principle of the decision in *Garven v. Birch* (*b*). There the plaintiff abstained from trying his cause at the assizes, for which he had given notice, in consequence of a proposal from the defendant that it should await the event of another action against the defendant; and it was held by *Parke, B.*, that although the not proceeding to trial at the first assizes was sufficiently excused, yet that the not trying at a subsequent assize was a default which entitled the defendant to move for judgment.

Cur. adv. vult.

POLLOCK, C. B., now said—The question in this case was, whether the circumstance of a defendant having obtained an injunction to prevent the trial of a cause, is to be considered such an impediment to the proceedings of the plaintiff, that he is thereby relieved for ever after from

(*a*) 1 Chit. 280, n.

(*b*) 11 M. & W. 544.

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taking his cause down for trial; or whether it is merely an interruption, which ceases as soon as the injunction is removed, when it becomes the duty of the plaintiff to proceed to trial according to the practice of the Court. We are of opinion that, as soon as the injunction is removed, a plaintiff is bound to try according to the practice of the Court. On the present occasion the injunction was obtained very shortly after issue joined; and having been dissolved on the 12th of June, 1851, the plaintiff gave notice of trial on the 14th of June, 1851, and again on the 22nd of November. It may be that, independently of these two notices, the plaintiff was bound to try according to the practice of the Court, after the injunction was dissolved; but, no doubt, when he has twice given notice of trial and twice failed, it is very unreasonable to say that he will not now go to trial, because the proceedings were formerly stayed by injunction for a certain time. We are of opinion, therefore, that the rule must be made absolute, unless the plaintiff will give a peremptory undertaking to try on the first occasion.

Rule discharged on a peremptory undertaking.

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Jan. 29.

CROWLEY and Others v. VITTY.

PRENTICE moved for a rule calling on the plaintiffs in the above cause, and the Judge of the County Court of Surrey, to shew cause why a writ of prohibition should not issue to restrain the judge of the said court from proceeding in the above plaint.

It appeared from the affidavits that, on the 15th January, 1849, A. H. and S. Crowley (the plaintiffs), and J. Vitty (the defendant), entered into an agreement in writing, whereby "the former agreed to let, and the latter to take, the house and premises, 54, Lower Marsh, Lambeth, on the following terms and conditions: viz. rent at the rate of 20s. per week, payable as may be demanded by the said A. H. and S. Crowley. Four weeks' notice to quit from any day, and by either party, to be considered a legal and sufficient notice to quit; to be in writing. Possession is respectively given and taken on the 15th January, 1849, from which day rent is to commence." The defendant paid rent under this agreement for some weeks; but, being unable to continue the payments, in April, 1849, it was verbally agreed between the plaintiffs and defendant that the latter should hold the premises at the weekly rental of 16s., which was subsequently paid; and on two several occasions the plaintiffs distrained for the same. The defendant deposed that the annual value of the premises was 60*l.* at the least. On the 1st September, 1851, the defendant was served with notice to quit on the 29th; but not having done so, the plaintiffs entered a plaint in the county court, under the 122nd section of the 9 & 10 Vict. c. 95(a). It was objected that the Court had no jurisdiction, inasmuch

By a written agreement, the plaintiffs let to the defendant certain premises at a rent of 20*s.* a-week, payable as demanded; four weeks' notice to quit from any day to be sufficient. During the continuance of this tenancy, the plaintiffs verbally agreed with the defendant to accept 16*s.* a-week, which was accordingly paid, and, on two occasions, the defendant submitted to a distress for that amount:—
Held, that no new demise was thereby created, and consequently the county court had no jurisdiction under the 122nd section of the 9 & 10 Vict. c. 95, the rent being above 50*l.*

(a) That section enacts, "That house, land, or other corporeal when and so soon as the term hereditament, where the value of and interest of the tenant of any the premises or the rent payable

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as the rent in the written agreement exceeded 50*l.*, and it was not competent to vary its terms by a verbal agreement to accept a reduced rent. The judge, however, made an order for possession.

Prentice (after stating the above facts).—Since the case of *Marshall v. Lynn*(a), it can scarcely be contended that the terms of a written agreement may be altered by parol; but it will be argued on the other side, that the verbal agreement to accept a reduced rent operated as a surrender and re-demise of the premises. But this agreement cannot have that effect, for the same tenant remains in

in respect of such tenancy did not exceed the sum of 50*l.* by the year, and upon which no fine shall have been paid, shall have ended, or shall have been duly determined by a legal notice to quit, and such tenant, or, if such tenant do not actually occupy the premises, or occupy only a part thereof, any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be

lawful for such landlord or agent to give to the Court proof of the holding, and of the end or other determination of the tenancy, with the time or manner thereof, and, where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of service of the summons, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the judge to issue a warrant under the seal of the

possession, and for the same term. All the authorities on the subject are reviewed in Smith's Lead. Cas. vol. ii. p. 459 a, where reference is made to a case of *Creagh v. Blood*(a), in which Sir *E. Sugden*, C., after expressing a doubt whether an estate of freehold could be surrendered by operation of law, says, "Where the statute speaks of surrender by operation of law, it certainly alludes to those surrenders where a party, whether by estoppel or otherwise, accepts an estate inconsistent with the estate he has." It must be admitted that the authorities on the subject are not uniform, but the true doctrine is laid down by this Court in *Lyon v. Reed* (b), viz. that the term "surrender by operation of law" is properly applicable to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist. *Nickells v. Atherstone*(c) proceeded on the ground of estoppel. Here the verbal agreement is not binding as a new demise, for there is no consideration to support it. Besides, it is sworn that the annual value of the premises is above 50*l.*, and the county court has no jurisdiction if either the *value* or rent is above that amount. [*Parke*, B.—There is evidence that the premises are not worth 50*l.* a-year, for the landlords have consented to take less.]

Pearson shewed cause in the first instance.—This case falls within the principle laid down in *Lyon v. Reed*, viz. that a surrender by deed is unnecessary, where the former lessee is the party who takes the new lease, as the fact of his so doing is evidence that the new lease has been accepted by him, and such acceptance operates as a surrender in law. It is conceded that *Geeckie v. Monk* (d), *Doe d. Monk v. Geeckie*(e), and *Clarke v. Moore*(f), are at variance

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(a) 3 Jones & Lat. 133.

(b) 13 M. & W. 285.

(c) 10 Q. B. 944.

(d) 1 Car. & K. 307.

(e) 5 Q. B. 841.

(f) 1 Jones & Lat. 723.

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with that view; but *Buckworth v. Simpson* (a) is an authority to shew that a new relation of landlord and tenant may arise by implication from the situation of the parties. In *Gore v. Wright* (b), the defendant's giving up possession was held a sufficient consideration for an abandonment of the rent; so here, the consent of the plaintiffs to accept a reduced rent, is a sufficient consideration to create a new tenancy on those terms. [*Martin, B.*—Suppose the plaintiffs sued the defendant for the rent of 20s., would it be any answer to say, that they agreed to accept 16s.?] The county court judge was the sole judge of whether the case came within the Act. The reduced rent is a criterion of the value. [*Alderson, B.*—Suppose a person takes a piece of ground at a rent of 25*l.* a year, and builds on it a house worth 2000*l.*, could the owner of the land proceed in the county court under the section in question? *Parke, B.*—There is nothing to bind the plaintiffs to accept the reduced rent. The transaction really amounts to no more than an indulgence on the part of the landlords, which may be put an end to at any time. There was no surrender, because there was no new demise. Therefore, the rent being above 50*l.*, it is unnecessary to consider the point with reference to the value. *Martin, B.*—This is nothing more than the plaintiffs saying, "I will take 40*l.* instead of 52*l.*"

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MARKS v. HAMILTON.

Jan. 24.

THIS was an action of covenant against the Sun Fire Office, sued in the name of their treasurer, under the 54 Geo. 3, c. ix., on a policy of insurance, effected by the plaintiff on a dwelling-house, auction room, and offices, household goods, fixtures, wearing apparel, &c. The declaration contained the usual averment, that, at the time of the making of the policy, and from thence until and at the time of the loss and damage &c., the plaintiff was interested in the said dwelling-house, &c. The defendants pleaded (*inter alia*), that the plaintiff was not, at the time of the loss, interested in the said dwelling-house, *modo et formâ*.

An insolvent debtor, who has in his possession goods which have vested in the provisional assignee, under the 1 & 2 Vict. c. 110, s. 37, has nevertheless an insurable interest in such goods.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after last Term, it appeared that, in April, 1848, the plaintiff was, on his own petition, discharged under the Insolvent Debtors Act, 1 & 2 Vict. c. 110. On the 5th of September following, he effected the policy in question, on property acquired by him after his discharge. The premises and goods were destroyed by fire on the 11th of November, 1848, subsequently to which, his creditors having discovered fraud in the proceedings, he was again brought before the Court; and on a re-hearing of the case, the original order of discharge was annulled, and he was adjudged to be imprisoned for twelve months from the date of the vesting order. The learned Judge directed the jury that the plaintiff had an insurable interest in the property in question, and a verdict was found for him, with 700*l.* damages.

The *Attorney-General* moved (January 15) for a new trial, on the ground of misdirection.—The plaintiff had no insurable interest in this property. The 1 & 2 Vict. c. 110, s. 37, vests in the provisional assignee all the property which an insolvent possessed at the time of filing his peti-

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tion, and also all the future estate which he may acquire before he becomes entitled to his discharge. Now, in this case, the order for the insolvent's discharge having been annulled, he was, at the time he effected the insurance, in the same position as if the order had never been made; and consequently the provisional assignee was entitled to the property in question, and might compel the insurance Company to pay the money to them. A party who insures must have a real and tangible, and not a mere speculative, interest in the property insured. [*Pollock, C. B.*—It is enough, if he is *responsible* to some person for the property. There are many cases on marine policies, which shew, that if a person can be called upon to account for property, he has an insurable interest in it (*a*). *Alderson, B.*—The insolvent, having the possession of the property, is responsible for it to his assignees; then why may he not insure it? He has simply a naked possession by permission of his assignees.

Cur. adv. vult.

POLLOCK, C. B.—In this case, which was a motion by the *Attorney-General* for a new trial, on the ground that there was no insurable interest in the plaintiff, who was an insolvent, and had acquired property after he had obtained

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HUMFREY v. THE LONDON AND NORTH-WESTERN RAILWAY
COMPANY.

Jan. 24.

CASE.—The declaration stated that, before and *at the time of the committing of the grievances* by the defendants, a certain close, with the appurtenances, situate in the parish or hamlet of Thorpe Langton, in the county of Leicester, that is to say, a certain close *abutting*, on the south and on the east, *on a certain close in the occupation and possession of the defendants*, and on the west on a certain highway leading from Great Bowden to Welham, was in the possession and occupation of a certain person, to wit, J. Ward, as tenant thereof to the plaintiff, the reversion of and in the said close then and still belonging to the plaintiff; yet the defendants, well knowing the premises, but contriving &c. to injure the plaintiff in his reversionary estate and interest of and in the said close, with the appurtenances, whilst the said close was held by the said tenant thereof as aforesaid, and whilst the plaintiff was so interested therein as aforesaid, to wit, on &c., wrongfully and unjustly, without the leave or license and against the will of the plaintiff, cut, dug, excavated, and made divers holes and pits in the said close, and removed a large quantity of gravel, &c.

There was also a count in trover.


Pleas to first count.—That the defendants were and are the London and North-Western Railway Company, incorporated by the Act of Parliament &c. (9 & 10 Vict. c. cciv.). That the London and Birmingham Railway Company, in the said Act mentioned, was the London and Birmingham Railway Company mentioned in the Act of Parliament made and passed in the same session, &c. (9 &

In actions for trespass to land, the locus in quo should be designated by abuttals, or other description, as it was at the time of the trespass, and not at the time of declaration. Therefore, where, in an action by a reversioner, the declaration described the locus in quo as "abutting on the south and east on a close in the occupation and possession of the defendants;" and the defendants, (a Railway Company), pleaded, that they took possession of part of the said close, abutting on the south on the fence of their railway, under the provisions of the 8 & 9 Vict. c. 20, ss. 32, 33, which was the trespass complained of; and it appeared at the trial, that, at the time the trespass was committed, the close in question abutted on the fence of the railway, but that afterwards

the defendants took possession of and purchased, under the provisions of the above Act, a small part of it adjoining the railway, so that the plaintiff's description was correct at the time of declaration, but not at the time of the trespass:—*Held*, that the plaintiff could not recover, for want of a new assignment.

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10 Vict. c. cxvii.). That a certain part of the close in the declaration mentioned is of the size of one acre, and is longer in measuring it from its east to its west end than it is in measuring it from its north to its south side, and at its west end, and where it abuts upon the highway in the declaration mentioned, terminates in a pointed shape like an acute angle, and which said part of the close in the declaration first mentioned is land which, on the north side thereof, abuts on land in the occupation of the defendants, and on the south side thereof, on the fence of the railway there, the site of which railway there is part of the close in the declaration mentioned as being in the occupation and possession of the defendants, and which said part of the close in the declaration mentioned is also part of the piece of land hereinafter for convenience called land (A). That, after the passing of both the said Acts, and before the expiration of the period of five years from the passing of the secondly mentioned Act, and more than three weeks before the entry of the defendants as hereinafter mentioned, to wit, on &c., the said land (A.), not then or at any of the times hereinafter mentioned being a garden, orchard, or plantation, attached or belonging to a house, &c. (negating the exceptions in the 32nd section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20), but then being required by the defendants for the purpose of



owner, and to the said J. Ward, then being the occupier of the said land (A.), of their intention to enter upon the said land (A.), for the purpose for which the same close was so then required as aforesaid, and did in such notice state the substance of the provisions contained in the Railways Clauses Consolidation Act, 1845, aforesaid, respecting the right of the plaintiff and the said J. Ward, as such owner and occupier as aforesaid, to require the defendants to purchase the said land (A.), or to receive compensation for the temporary occupation thereof, as the case might be, and did so then give such notice to the said plaintiff by leaving the same at the plaintiff's then last usual place of abode, and did so then give such notice to the said J. Ward, by then serving the same on the said J. Ward personally. That the defendants did afterwards, and three weeks after the said notice had been so given as aforesaid, and before the expiration of the said period of five years from the passing of the said secondly mentioned Act, and in a reasonable time in that behalf, and just before the times when, &c., to wit, on &c., enter upon the said part of the said close adjoining part of land (A.) aforesaid, and did occupy and use the same part for the purpose for which the same was so required as aforesaid, from thenceforth for a certain time necessary for the construction of the said railway, to wit, for six months then next following, which last-mentioned period elapsed before the expiration of the said period of five years from the passing of the secondly mentioned Act, as they lawfully might, according to the form and under the provisions of the said several Acts of Parliament. That in so using the said part of the said close for the purposes for which the same was so required as aforesaid, they the defendants necessarily and properly, at the said several times when, &c., in order to obtain materials from the said part of the said close for the construction of the said railway, did cut, dig, excavate, and make in the said part of the said close holes, pits, &c., and

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carry away from the said part of the said close the said earth, gravel, &c., as and for such materials, doing no unnecessary damage, &c., quæ sunt eadem.—Verification.

Replication, de injuriâ.

At the trial, before *Maule*, J., at the last Leicester Summer Assizes, it appeared that the plaintiff was the owner of a piece of land adjoining a branch railway which the defendants were constructing under the provisions of the 9 & 10 Vict. c. cxvii.; and that the defendants entered on the plaintiff's land, and dug pits therein for the purpose of getting gravel, to be used in the construction of the railway. At the time the acts complained of were done, the plaintiff's land abutted, on the west, upon the highway leading from Great Bowden to Welham, as described in the declaration, but on the south and east it abutted on the fence of the defendants' railway. After the acts complained of were done, the defendants gave notice to the plaintiff, under the 32nd and 33rd sections of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, of their intention to enter upon a part of the plaintiff's land adjoining their railway, for the purpose of getting materials for its construction. This part of the plaintiff's land, which was a narrow slip of about an acre, was afterwards purchased by the defendants, and is the close mentioned in the declaration as being in the occupation and possession

of trespass on the other part of the close, without a new assignment. The learned Judge overruled the objection, and a verdict was found for the plaintiff.

Macaulay, in the following Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection; against which

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Humfrey, Hayes, and Brewer shewed cause (a).—The description, in the declaration, of the abuttals of the locus in quo, will equally apply, whether the slip of land, which the defendants afterwards purchased, be excluded or included. A plaintiff, pleading ore tenus, would describe the close as it then abutted, and not by its boundaries at some former period. [*Parke*, B.—Suppose a trespass was committed in a close abutting on a piece of land, which was afterwards covered by an encroachment of the sea, how would the abuttals be described? *Alderson*, B.—A part of Regent-street is built on what was formerly Swallow-street; but if an assault had been committed on a person in Swallow-street, would it be correct to declare that it was committed in Regent-street?] The language here used is not “which now abuts,” but “abutting,” which may mean either that it abutted at the time of the trespass, or at the time of declaration. The objection, therefore, is only one of ambiguity, which the defendants might have rectified by application to a Judge at Chambers. [*Parke*, B.—A statement that a trespass was committed in a close “abutting” so and so, means that *at that time* it abutted.] The description of abuttals should be construed with reference to the particulars of the trespasses; and it is sufficient if the description be such that the party may know what close was intended in the particulars. It would af-

(a) The rule, which was also argued in Michaelmas Term granted on the ground that the (Nov. 21), and in Hilary Term verdict was against evidence, was (Jan. 13).

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ford little information to describe a close by the name of a former occupier; the correct mode would be to name the person in whose occupation it then was. [*Alderson, B.*—Suppose a close, at the time of a trespass committed, was in the occupation of A., but at the time of declaration B. occupied it, how would a person suing for an injury to the reversion describe it?] It would be correct to say, “then being in the occupation of B.” *North v. Ingamells* (a) decided that a description of a close by two abutments only was sufficient. *Alderson, B.*, there says: “It is clear that no rule could be made in this case so as to exclude all possible ambiguity. If the defendant can shew that there is a real ambiguity, and that he cannot see distinctly what close is indicated by the plaintiff’s declaration, he may apply to a Judge for a better description.” At all events, the words “in the occupation and possession of the defendants” will apply either to the railway or to the slip of land; for if they were not in the occupation of the latter at the time of the alleged trespass, the plea was not proved.

Macaulay and *Mellor* appeared to support the rule; but

PARKE, B. said—It is not necessary to hear the defendants’ counsel, as our present opinion is that the plaintiff ought to have more assigned.

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THE ATTORNEY-GENERAL v. LORD HENNIKER.

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THIS was a special verdict, on an information for legacy duties.—The special verdict and information stated, in substance, that John Henniker Major Baron Henniker made his will on the 26th of May, 1821, and thereby appointed John Minet Henniker, Thomas Smith, and Evan Foulkes, his executors, and bequeathed the residue of his personal estate and effects, except leasehold estates, unto them, their executors, administrators, and assigns,

Where a testator, by his will, gives a power to A. B. to appoint to his wife an annuity chargeable upon the land of the testator if A. B. shall think fit, and A. B. makes the appointment, but with the con-

dition that the wife takes it on relinquishing her dower, legacy duty is payable upon such annuity, under the 45 Geo. 3, c. 28.

Where such condition is annexed by the original testator himself, *quære* whether duty is payable either upon the whole annuity, or upon the amount of it after deducting the value of the dower.

A. B., by his will made in 1821, after disposing of his property in various ways, and after giving directions as to the purchase of estates in the county of S. with the proceeds of estates in the counties of E. and K., directed a deed of settlement of his estates to be executed, and that there should be inserted in such settlement a power to the tenant for life, "and entitled to the rents and profits of the estates so to be settled, by deed or will duly executed, to charge all or any part of such estates with any annual sum or sums of money, not exceeding one-third part of the annual value thereof, unto or for the benefit of any woman or women with whom he or they might respectively happen to intermarry, or with whom he or they might have intermarried, as and for and in the nature of a jointure." Upon the death of A. B., in 1822, C. D. succeeded to the estates; and by his will, in execution of that power, and of all other powers given, charged all the estates he had power to charge "with the payment of the annual sum of 2000*l.*, free and clear from taxes, and without any other deduction whatsoever, unto and for the benefit of his wife Lady H., during the term of her natural life, the said yearly rent or annual sum of 2000*l.* to be in the nature of and in full for the jointure of his said wife, and to be in lieu, bar, and satisfaction of and for her dower or thirds at common law, or by or on account of customary free bench which she could and would or otherwise might have or claim of, in, or out of the freehold, copyhold, or customary manors" of C. D. This will also provided, that in case C. D. was not authorised and empowered by the will of A. B. to charge the estates thereby devised, and directed to be purchased and settled respectively as aforesaid, with the payment of so large an annual sum as 2000*l.* by way of jointure, the deficiency, if any, should be a charge upon, and the said C. D. thereby expressly made liable to, and charged such part and parts of his real estates by his will devised as should not be sold under the trusts in his will contained as thereafter mentioned with, the payment of such deficiency. Upon the death of C. D., the defendant succeeded to the estates as heir-at-law, and entered into possession and receipt of the rents and profits, and made several payments of the annuity to Lady H., the wife of C. D., who was a stranger in blood to A. B.:—*Held*, that legacy duty was payable upon the whole of the annuity, and that the defendant, either as trustee or the person in possession, was the party bound to pay it.

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in trust for certain purposes; and the said testator, by his will, devised his real estates at Stratford-upon-Avon, in Ireland, and in the counties of Essex and Kent, to his said trustees, upon trust, to dispose of the same by sale, and to purchase with the proceeds thereof estates in the county of Suffolk, with directions that a deed of settlement should be made of his estates, and that by such conveyance they should be limited in strict settlement, so that they might accompany the title of the Barony of Henniker. "And the said testator did thereby direct that, in the said settlement, there should be contained the usual power, enabling the person who should, for the time being, be tenant for life, and entitled to the rents and profits of the estates so to be settled, by deed or will duly executed, to charge by effectual ways and means all or any part of such estates with any annual sum or sums of money not exceeding one-third part of the annual value thereof, unto or for the benefit of any woman or women with whom he or they might respectively happen to intermarry, or with whom he or they might have intermarried, as and for and in the nature of a jointure." The special verdict then proceeded to state the death of John Henniker Major, leaving the said trustees surviving him; and that they took upon themselves the execution of the will; and that the estates were sold and the proceeds were

payment of the annual sum of 2000*l.* of lawful money of Great Britain, free and clear from taxes, and without any other deduction whatsoever, unto and for the benefit of his said wife Mary Lady Henniker, during the term of her natural life; the said yearly rent or annual sum to be in the nature of and in full for the jointure of his said wife, and to be in lieu, bar, and satisfaction of and for her dower or thirds at common law, or by or on account of custom, free-bench, or widow's part, which she could, should, or otherwise might have or claim of or in or out of the freehold, copyhold, or customary manors," &c., of the second Lord Henniker; and in case the said Lord Henniker "was not authorised and empowered by the said will of the said (first) testator, to charge the estates thereby devised and directed to be purchased and settled respectively as aforesaid with the payment of so large an annual sum as 2000*l.* by way of jointure, the deficiency, if any, should be a charge upon, and the said John Minet Henniker Major Lord Henniker thereby expressly charged and made liable, such part and parts of certain of his real estates and hereditaments in and by his said will devised, as should not be sold under the trusts in his said will contained, as hereinafter mentioned, with and to the payment of such deficiency."—The special verdict then proceeded to state the death of the second Lord Henniker on the 1st of July, 1832, leaving Lady Henniker, John Henniker Major (the defendant) and John Lake, surviving him; and that the defendant and Lake took upon themselves the execution of the will; that the defendant succeeded to the estates, and that he entered into possession thereof and of the receipt of the rents and profits, subject to the charge created by the will of the second testator in favour of Lady Mary Henniker; and that Lady Mary Henniker was a stranger in blood to the first testator. The special verdict then proceeded to state, that the second Lord Henniker, in his lifetime, by deeds dated the 11th and 13th of May, 1822,

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the 7th and 8th of May, 1828, and the 7th and 9th of February, 1829, respectively, and recoveries suffered in pursuance thereof respectively, barred the entail of certain estates of which he was tenant in tail; and that Lady Mary Henniker joined in the recovery deeds, and extinguished her dower in those estates; and that afterwards the defendant paid to Lady Mary Henniker four annual payments of the said annuity of 2000*l.*, without having paid legacy duty thereon.—The special verdict then proceeded to set forth certain calculations, in case the Court should be of opinion that there should be a deduction for the value of the dower, or thirds, or free bench of Lady Henniker (a).

(a) The following were the points for argument on each side.

It will be argued on the part of the Crown, that the annuity charged and appointed by the will of John Minet Henniker Major Baron Henniker, for the benefit of his wife, Lady Mary Henniker, under the power given by the will of John Henniker Major Baron Henniker, so far as the same was payable out of the property charged therewith by the last-mentioned will, was a legacy by way of annuity under

much of the said annuity as is charged upon the property charged therewith, by virtue of the power contained in the will of John Henniker Major Baron Henniker, is to be deducted from the value of the said part of the said annuity so charged upon the said property.

The points of law intended to be argued on the part of the defendant will be (amongst others) the following:—

That no legacy duty was charge-



The special verdict was argued in the present Sittings (February 6) before *Parke*, B., *Alderson*, B., and *Platt*, B., by

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The *Solicitor General* (with whom was *Crompton*) for the Crown.—First, it is clear that if legacy duty is payable, the defendant is the party liable under the 45 Geo. 3, c. 28, sects. 4 and 5 (*a*). At the time the duty became payable there was living no trustee of the first testator; and the defendant is liable either as tenant for life or as heir at law.

was not properly exercised, more than one-third of the annual value having been charged, and a condition having been annexed to the charge, videlicet, that it should be taken in lieu of dower.

Because other property, besides that directed by the will of the first testator to be settled, was and is charged by the second testator with the payment of the annuity.

And because the widow could not take the annuity under the will of the second testator without giving up her dower as a consideration for so doing; and if she did give up her dower, then she took the annuity as a purchaser, and not as a gift from the first testator, and, consequently, could not be liable to pay legacy duty for it.

That if legacy duty be payable at all, it can only be payable in respect of the value of the interest derived by the widow under the will of the first testator, and which must be considered as reduced by the value of the dower given up for it.

That the defendant is not the

party liable to be sued for the legacy duty, or, if liable, that duty is payable according to the relationship of the second testator to the first.

That the facts stated in the special verdict impose by law no liability to the legacy duty, and affix none upon the defendant to pay any.

(*a*) Section 4 enacts, that, "every gift by any will, &c., of any person dying after the passing of this Act, which, by virtue of any such will, &c., shall have effect or be satisfied out of the personal estate of such person, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity or in any other form, shall be deemed and taken to be a legacy within

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Secondly. This is a rent charge or gift by way of annuity made payable out of land, and is, as such, subject to duty under the 4th section. That question was settled by *The Attorney-General v. Jackson* (a), which was followed by *Stow v. Davenport* (b), in which the propriety of the decision in the former case was fully discussed. In the latter case it was also held, that, as the gift was free from all taxes or deductions whatever, the annuitant took the legacy free of duty. So in the present case, the annuitant is entitled to the full amount of the annuity.

Thirdly. This annuity is a *legacy*, within the true meaning of the 4th section of the 45 Geo. 3, c. 28. This part of the case falls within the decision of *The Attorney-General v. Pickard* (c), which was afterwards affirmed on error (d). There the original testator by his will created a power to enable the tenant for life in possession to appoint, to any woman he might marry, an annuity for her jointure, and the tenant for life afterwards by his will exercised the power so conferred upon him; and this annuity was held to be a legacy given by the will of the first testator. The judgments of this Court and of the Court of Error clearly

the true intent and meaning of this Act. Provided always, that nothing herein contained shall be construed to extend to the

cies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, &c., shall

expound the principles upon which those decisions proceeded. That case is precisely similar to the present, with this exception, and it is one that is wholly immaterial in considering the present question, viz. that there the original testator directed that the power should be exercised by deed. The case would have been like the present if the testator had said "I give a certain sum to such of the children of A. as he shall appoint." Upon A.'s making the appointment, the child takes the legacy under the original will. The intervention of the act of nomination does not affect the question. But it will be contended that here a settlement is to be made which is to contain a power of jointuring; and that, as the interest of the annuitant would have been derived from the deed containing the power, and not from the will, and as no such deed was ever executed, the annuity was not payable under the will. But the power is clearly exercised under the will, and upon the property of the first testator. The charge was created by *him*, and is payable out of *his* property. The annuity is not lost through the non-execution of the deed. The deed does not operate upon the gift. It is merely part of the machinery by which the testator makes the gift. The gift is made by force of the will. It may further be contended, that the power has not been properly exercised, a condition having been annexed to the annuity, that it shall be taken in lieu of dower. But, at most, the condition alone, and not the appointment, would be void. It may, however, be remarked, that there would be but weak ground for contending that the condition would be void: *Newport v. Savage* (a). In the next place, it may be contended, that as Lady Henniker gave up her dower in consideration of the annuity, she took it as a purchaser, and not by way of legacy. But the consideration upon which the annuity was accepted does not benefit the estate of


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(a) 2 Sugden on Powers, App. No. 17.

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the original testator. He imposed the condition. If a testator leaves a sum of money to a creditor in consideration that the latter will release a debt, the creditor would be liable to duty to the extent of the surplus, after the amount of the debt had been deducted from the amount demised, for the presumption is, that a person is just before he is generous. The words of the 4th section are in effect: "any sum of money given out of the testator's estate to any party as a legacy under the will." It is for the party who takes the legacy, upon the conditions attached to it by the party who has the power of appointment, to decide whether he will take it upon those conditions; but the legatee has no right to deduct the value of the consideration so given from the amount of the legacy. The annuitant here, therefore, is not a purchaser; nor can the value of the dower be deducted from the value of the annuity in estimating the amount of the duty to be paid to the Crown.

Hoggins contra.—The defendant is desirous that no technical objection should be taken to the payment of the duty, but he contends that the power, as executed, was in bar of dower; and that, as Lady Henniker gave a valuable consideration for the annuity, she took it as a purchaser, and not by way of gift under the will of the original tes-



estate?] She takes by purchase, and if there were other legatees, and the assets were found insufficient to satisfy all the legatees, she would take priority of all the others: *Blower v. Morrett* (a), *Heath v. Dendy* (b), *Davenhill v. Fletcher* (c), *Norcott v. Gordon* (d), and *Burridge v. Brady* (e). The annuity is taken not only with the benefits attached to it, but with all its disadvantages, one being that the annuitant has to give up her dower. If the original testator had said by his will, "I grant to Lady Henniker 2000*l.* per annum, in consideration of a certain sum then paid by her," she could not be considered as taking the annuity under the will by way of gift. [*Alderson*, B.—If a testator were to give an annuity to his own wife in bar of dower, it might well be considered that his estate was relieved pro tanto, in the same way that it would be by the release of a debt.] The present case is to that effect. [*Alderson*, B.—As between her husband and herself, this lady may perhaps be considered to take as a purchaser, but she cannot be considered as such as between herself and the testator.] The word "gift" in the 4th section must be construed as a pure gift, i. e. where no consideration passes from the party receiving it. This question may be regarded in the following light also: The first testator by his will gave a general power of appointment, which, although given with a view to settle the estates strictly, in order to support the title, did not specify the terms upon which the appointment was to be made. The tenant for life was therefore entitled to make a settlement upon his wife upon any such terms as he might think fit. The power in that case is in effect executed upon the terms imposed by the testator. [*Alderson*, B.—Suppose a testator leaves 20,000*l.*, to be divided among the children of A. B., in such proportions as A. B. shall think

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(a) 2 Ves. sen. 420.

(b) 1 Russ. 543.

(c) 1 Amb. 244.

(d) 14 Sim. 261.

(e) 1 P. Wms. 126.

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fit, and A. B. is indebted to his eldest son in 1000*l*, and he proposes to apportion 10,000*l* to him if he will release his debt to him, and suppose the son accedes to the proposal, would legacy duty be payable by the son on 9000*l* only?] In that case the power would not be well executed; but in the present case the power is well executed, and according to the intention of the testator.

The *Solicitor-General* in reply.—The sole remaining question is, whether this annuity is a gift. It is not less a gift because the party who takes it ultimately out of the original testator's estate, enters into a bargain with the party who has the appointment, that bargain not conferring any benefit whatever upon the estate out of which the gift issues. The defendant's argument amounts to this—that the donee of the power is the agent of the original testator in making that bargain, and therefore that the case is the same as if the original testator himself had entered into the bargain with the person who takes the annuity. [*Parks, B.*—Can the donee of the power be said to have appointed the *whole* of the gift, where there is an agreement between him and the appointee, that the latter shall take the gift upon condition that half the money shall go in the purchase of an estate for the donee?] The whole of the

pose a testator leaves a gross sum at the appointment of A. B., and he appoints to C. D. upon condition that he will give him an estate, could C. D. be said to take the amount as a legacy, or is he a purchaser?] It is in truth the purchase of a legacy; but it is not less a legacy from the fact that it is sold by the donee. He could not sell it, except through the power and under the will of the original testator, for the donee does not possess it as his own. And the legatee knows that it is a legacy, and as such is liable to the incidents of a legacy, and, amongst other things, that it is subject to duty; and it is no less a legacy because something is given for it.

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Cur. adv. vult.

PARKE, B., now said—This case was argued before us yesterday. We have considered it, and are of opinion that our judgment ought to be in favour of the Crown.—[His Lordship stated the case, and proceeded:]—In the course of the argument, the dispute was ultimately reduced to one single point. It is perfectly clear, that, although no deed was executed—and indeed this was not disputed by Mr. *Hoggins*, who, on behalf of Lord Henniker, was desirous of taking no technical objection, but wished to meet the case on its merits—there was an equitable power to charge the estates with the annuity. The case therefore falls within the principle of the decision of this Court in *The Attorney-General v. Pickard*.

In the next place it is perfectly clear, that the present Lord Henniker, either as the heir of his father, who was the surviving trustee, or as the tenant for life in possession, was the person who by the Act of Parliament was bound to pay any duty, either as trustee or as person in possession.

It is also clear, that after the decision of *The Attorney-General v. Pickard*, this case would be considered precisely in the same view as if, instead of an annuity charge-

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able upon land, it had been a bequest of a sum in gross, say 1000*l.*, to be appointed, if the second Lord Henniker thought fit, to his wife. Then the only question is, whether there has been such an appointment to the wife, and such a taking by the wife by virtue of that appointment, as to make her the recipient of a *legacy*. Upon this point there was a little doubt in the course of the argument; but that doubt was completely removed from the minds of the Court by the reply of the *Solicitor-General*. The case therefore becomes this:—A power is given by the will of the first Lord Henniker to the second Lord Henniker to appoint the 1000*l.* to his wife, if he thinks fit. He appoints it to the wife, and by the same instrument by which he appoints it he imposes upon her the condition of relinquishing her dower and thirds, and her freebench upon all the copyhold estates. The question is, whether that is to be considered and treated as a purchase of the dower and thirds and freebench, or whether it is merely a condition annexed to the receipt of the legacy. For that condition, if she accepts the legacy, makes no difference; she is still the recipient of the legacy. And we are of opinion that this is nothing more than the appointment of a legacy upon a condition. She knows, by the instrument by which the legacy is appointed, that it is a legacy, and if she takes it, she takes it as a gift of the original testator, and whether the person

extent of the difference in value between the legacy and the estate given up in consideration of it. That may be so; but that question must be settled hereafter when it comes before the Court. It is sufficient to say, that that point does not arise in the present case, which is just the same as if there were no condition annexed by the testator. It does not make any difference whether the legatee is liable to pay the duty upon the legacy. If any question were hereafter to arise between Lord Henniker and Lady Henniker, in endeavouring to recover back the money which he had been compelled to pay as legacy duty, it might be material to consider whether or not the legacy duty was to be paid by the legatee or out of the estate, according to the terms of the will; but no question arises about that matter here. The case is precisely the same as the one I have already stated; it comes to that simple case, and the Court is of opinion that the person taking the legacy takes the whole of it by the gift of the testator; and consequently, that legacy duty must be paid upon the whole.

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Judgment for the Crown.

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A testator made his will in the following terms:—"I give and bequeath all my property, of whatsoever description, to my wife, for the maintenance of herself and our children" (naming seven in number), "and I constitute my said wife to be sole executrix of this my will," &c. :—*Held*, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to deliver an account to the Legacy Duty Office.

THIS was a rule calling on John Richmond and Eliza his wife (formerly the wife of John Harris, deceased, and now his executrix), to shew cause why they should not deliver an account of the legacies and property of John Harris.

The will of John Harris, who carried on the business of a baker at Cambridge, was in the following terms:—"I give and bequeath all my property, of whatsoever description, to my wife, Eliza Harris, for the maintenance of herself and our children" (naming seven children), "and I constitute my wife to be sole executrix of this my will," &c. It also appeared by the affidavits, that application had been made for an account on the part of the Inland Revenue Office, when it was intimated that the office would be satisfied by a statement that the children had not more than 20*l.* each; to which an answer was returned, that the will did not contain a trust for the children, and that the executrix preferred that the question should be authoritatively settled.

Worlledge, for the executrix, shewed cause.—The executrix is not bound to render an account: first, because under the will she takes absolutely the whole interest in the

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during her natural life, the property to be converted into money as soon as convenient after my decease, at the discretion of Mr. T. B., my executor, of which my wife, C. M., is to receive the interest, *for the maintenance of herself and children.*" The question in that case was what interest the children took under the will, and the Vice-Chancellor held that the wife was to receive the whole of the income, and to maintain the children out of it as long as they should form part of her family, but that they lost that right upon becoming foris-familiated. The will in the present case does not create a trust in favour of the children. The legacy is granted to the wife, that she may be the better enabled to maintain her children. The legacy is not given to maintain the children. In the latter case, a trust in their favour might be created. The case of *Thorp v. Owen* (a) may be cited as an illustration of this position. There the testator, by his will, desired that everything during the lifetime of his wife should remain as it was, for her use and benefit, and after her decease he gave his real estate to his male heir, and his personal estate to be equally divided among all his children, adding, that he gave the above devise to his wife that she might support herself and her children according to her discretion, and for that purpose; and Vice-Chancellor *Wigram* held, that the widow took an absolute interest for her life in the real and personal estate. The principle to be deduced from the judgment of the Vice-Chancellor in that case applies to the present, viz. that where "words of trust are not used so imperatively as to exclude the legatee from taking anything beneficially, there the difficulty of ascertaining how much that legatee was bound to give away, is a strong argument against construing the gift to be a trust." In *Crockett v. Crockett* (b), the words of the will were "Be it known to all that this my last desire is, that all and every

(a) 2 Hare, 607.

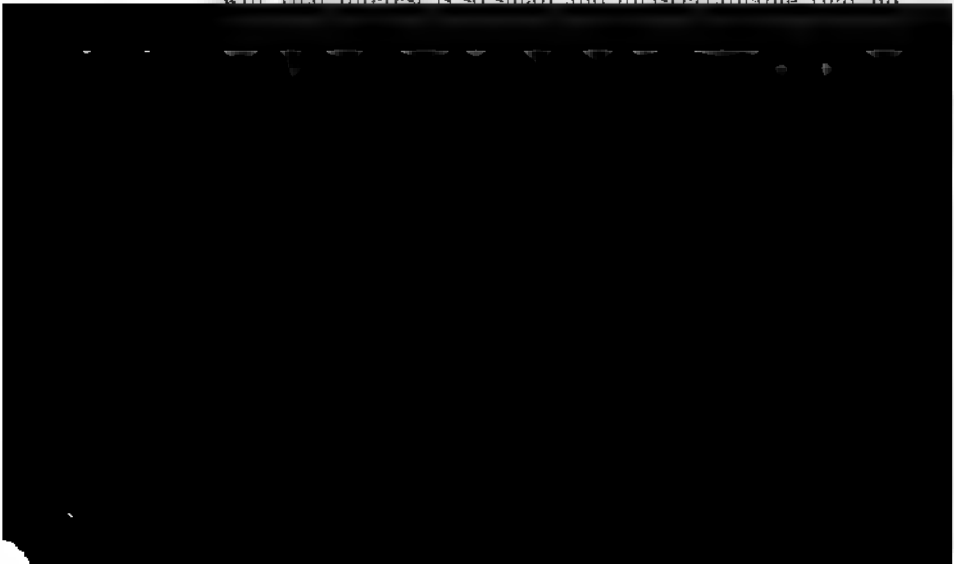
(b) 1 Hare, 451.

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part of my property shall be at the disposal of my most true and lawful wife, Caroline Crockett, for herself and children." Vice-Chancellor *Wigram* held that the wife and children were joint tenants of the property; but that decision was afterwards reversed by Lord Chancellor *Cottenham* (a), without, however, giving any opinion upon the precise meaning of the will. That case is distinguishable from the present, for the words would convey a larger interest to the children than those here used. In *Woods v. Woods* (b), Lord *Cottenham* held that the words "all over-flush to my wife towards her support and her family," gave the children an interest. But that case does not shew that there was any aliquot portion of the gift as to which the widow could be considered as a trustee for the children. There is no sound reason why the will should be construed so as to create that interest, for such a construction would not benefit the children, as the widow by law, independently of the will, is bound to apply the funds towards the maintenance of the children. The proper construction is, that the widow takes the whole with a confidence reposed in her by her husband that she will do her duty towards them. *Pope v. Pope* (c), and *Longmore v. Elcum* (d), are also in favour of this position.

Secondly. If the children take any interest under the will, that interest is so small and unascertainable that no



to ascertain how much has been expended upon each child for each meal; and as these separate applications of the fund are to be considered as separate legacies, it is clear that no single expenditure for maintenance can equal 20*l.*, and therefore it cannot be liable to legacy duty. Neither would she be enabled to retain the duty under the terms of the statute in question.

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The *Solicitor-General* (*Crompton* with him) in support of the rule.—The simple question is, whether the executrix is bound to furnish an account. There is nothing in the will to reduce the amount of the legacies below 20*l.*, and therefore the question may be treated as it would be if the testator had left his wife 10,000*l.* a-year for the maintenance of herself and of her children. Upon the account being rendered, it becomes the duty of the Legacy Duty Office to ascertain how much of that income has been applied towards the maintenance of the executrix, and how much towards the maintenance of the children. It is now well settled, that a gift to a wife, for the maintenance of herself and her children, is a gift which confers such an absolute interest upon the children as to entitle them to require some portion of that gift to be applied for their benefit. It may be admitted, that considerable discretion in the application of that gift is left to the legatee; but the children may maintain a suit in equity if the legatee be guilty of the least malfeasance with respect to the property so left; and on reference to a Master, he would ascertain the proper allowance to be made to each of the children. The cases already cited and relied upon are authorities that this will does create a trust. In *Longmore v. Elcum* (a) the words of the will were, that the wife was “to receive the rents, issues, income, profits, and proceeds thereof, for her own use and benefit, and for the

(a) 2 Y. & C. C. C. 363.

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maintenance and education of my dear children." The words there were extremely strong in favour of the view that the wife should take the whole. *Woods v. Woods* is precisely in point with the present case. If, therefore, there is any trust in favour of the children, the executrix is bound to furnish an account. [*Parks, B.*—The present case is very distinguishable from that of *Thorp v. Owen (a)*, where there was an absolute gift to the wife in the first part of the will, in which the testator commenced by saying "I desire everything to remain in its present position during the lifetime of my wife, for her use and benefit." That was an absolute gift to the wife. Then the subsequent clauses of the will, which were contended to amount to a trust, had not in truth that effect. They were only the motive for giving to the wife the absolute disposition of the property. The words were, "I give the above devise to my wife, that she may support herself and her children according to her discretion and for that purpose." The Vice-Chancellor, though with some doubt, said, that if that be an absolute gift, it cannot be cut down to a trust. Now it is not necessary for the Crown in the present case to shew that the children are liable to legacy duty, but only that there is a possibility of their being liable.]—He was then stopped by the Court.

1852.

SIMPSON and Two Others, Assignees of JOHN READ, an Insolvent Debtor, *v.* WOOD.

Feb. 7.

ASSUMPSIT by the plaintiffs, as assignees of Read, an insolvent debtor, for goods sold and delivered by the plaintiffs as such assignees to the defendant, and on an account stated. Plea, non assumpsit; and issue thereon.

At the trial, before *Platt*, B., at the last Yorkshire Summer Assizes, it appeared that this action was brought to recover from the defendant the proceeds of the sale of the farming stock and other furniture of the insolvent. On the 28th of November, 1850, by an indenture then made by and between the defendant and the insolvent, in consideration of the sum of 510*l.* then due from the insolvent to the defendant, and of a further sum not exceeding 700*l.* then agreed to be advanced, Read bargained, sold, and assigned to the defendant all his household furniture, goods, and effects, and all corn and growing crops, &c., and other personal estate and effects, to hold the same absolutely as his own property, with a proviso, that if Read should pay the defendant the money due on the 1st of January, 1851, the deed should be void. The deed contained a further proviso, that, in case default in payment on that day should be made, the defendant should take possession, and should hold and enjoy the property assigned, and should at his discretion sell and dispose of the same, and receive the proceeds of the sale, in trust, after payment of the costs, "to retain and apply such monies in or towards satisfaction of all such principal and interest

A. B., by deed, in consideration of certain prior advances, and of a further sum agreed to be advanced, bargained, sold, and assigned all his household furniture and other personal effects to the defendant, to hold absolutely as his own property, with a proviso, that if A. B. should pay the money due on a day therein named the deed should be void. The deed further provided, that, on default made in payment on the day named, the defendant should take possession, hold, and enjoy the property, and should, at his discretion, sell and retain the proceeds in trust to pay himself the sums due, and to pay the surplus, if any, to A. B.

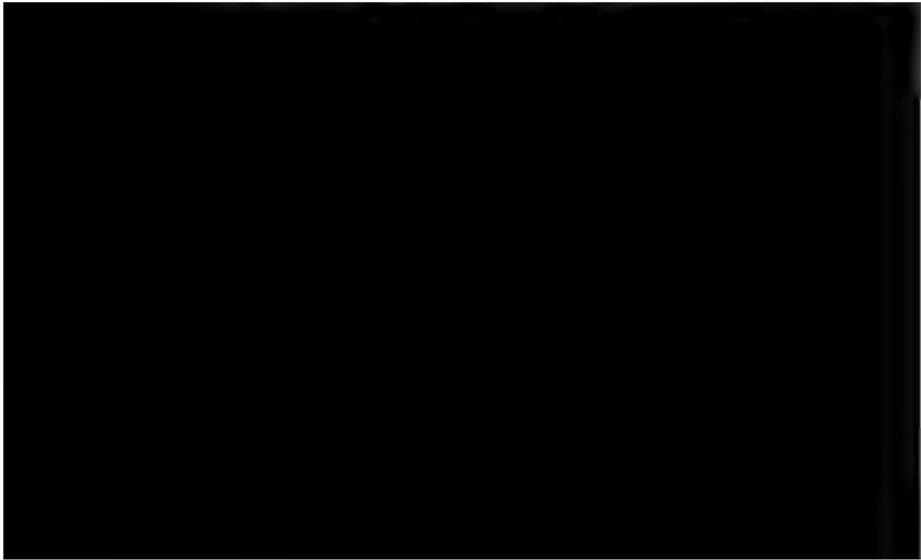
A. B. made default in payment on the day specified, and the defendant took possession of the goods. A. B. afterwards filed his petition for protection under the 7 & 8 Vict. c. 96, and the defendant, after A. B. had filed his petition, sold the goods included in the deed:—*Held*, in an action by the assignees of A. B. against the defendant, for the proceeds of the sale, that, as the bill of sale was absolute before the filing of the petition, the defendant had not "availed himself" of it under the 7 & 8 Vict. c. 96, s. 21, by the sale after the filing of the petition, and therefore that the assignees were not entitled to recover.

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as for the time being shall be due and owing on security of these presents," and then to pay the surplus, if any, to Read. It was not disputed that this bill of sale was a bonâ fide transaction, for money advanced by the defendant to the insolvent. On the 14th of February, 1851, the defendant took possession of all the property. On the 25th of the same month, Read filed his petition for protection, and on the following day he obtained protection. On the 4th of March, the defendant sold all the property comprised in the bill of sale. The plaintiffs claimed the proceeds of the property, on the ground that they were entitled to them as assignees of the insolvent, as the defendant had availed himself of the bill of sale, under the 7 & 8 Vict. c. 96, s. 21, by the sale of the property after the filing of the petition by the insolvent. On the part of the defendant, the contrary of this proposition was contended for. A verdict was found for the plaintiff, with leave to the defendant to move to set that verdict aside, and to enter a verdict for him.

In Michaelmas Term last, *Bliss* obtained a rule nisi accordingly.

Atherton shewed cause.—The question is, whether the defendant "availed himself" of this bill of sale after the filing of the insolvent's petition. If he did, the plaintiffs are



instrument, by the sale of the property on the 3rd and 4th of March. By the terms of that instrument, the sale was not absolute at the time the instrument was executed. [*Parke, B.*—This is not a mere power to sell, but a bill of sale properly so called, being an absolute conveyance of all the bargainor's property to the defendant. The statute applies only to those cases where the instrument is of an executory nature, and requires something to be done to make the transfer effectual, and where such act is done after the filing of the petition. But where the party is in possession of the property as absolute owner before the petition, a sale afterwards does not bring the matter within the statute. This was decided in *Hunt v. Robins* (a), which was afterwards acted upon in this Court in *Hardy v. Tingey* (b).] The bargainee was bound to sell, and the bargainor had an interest in the property; for, as long as the former held the goods, he held them as trustee for the bargainor. The property may greatly exceed the amount of the loan, and therefore it was the intention of the parties that a sale should ultimately be effected. The defendant had a mere qualified right to the goods as a security for the money he had advanced. What was done after the petition was done under the bill of sale. The defendant, therefore, availed himself of that instrument.

Bliss and *E. P. Price*, in support of the rule, were not called upon.

POLLOCK, C. B.—It is not necessary to hear any argument on the part of the defendant, as we are all clearly of

thereof, or by sale of such property theretofore seised, or any part thereof, or avail himself of such bill of sale; but that any person or persons to whom any sum or sums of money shall be due in respect of any such war-

rant of attorney or cognovit actionem, or of such bill of sale, shall and may be a creditor or creditors for the same under the said recited Act and this Act."

(a) 3 Q. B. 300.

(b) 5 Exch. 294.

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opinion that the rule ought to be absolute to enter a verdict for the defendant. The principle upon which this question is to be decided has been expressly stated by my Brother *Parke*, and, I believe, by every member of the Court, in the course of the argument. The object of the Act of Parliament—and this object is in conformity with the course of modern legislation—is that whatever transactions are complete, and do not require any further step to be taken before the filing of the petition, should remain complete; and, on the other hand, whatever is incomplete before that date, should remain so. In my opinion, this bill of sale is absolute, and had become absolute before the filing of the petition; and nothing more remained to be done under it than for the owner of the property to exercise those rights which were already created. The expression made use of by the learned counsel on the part of the plaintiffs, that what was done after the filing of the petition was done *under* the bill of sale, is incorrect; for as soon as the defendant was in possession, so far as respected all subsequent proceedings, the bill of sale was at an end. If a statute admits of two modes of interpretation, that mode is to be adopted which is most in accordance with the clear intention of the legislature. If we were to adopt the plaintiffs' argument, no man hereafter, be his credit ever so good, would be able to convey

reasonable construction of the 21st section is that which has been so fully given to it by my Lord Chief Baron. The meaning of the words "avail himself" is to be considered with reference to the other terms with which they are to be found associated in that section. Now a party cannot, after the filing of the petition, avail himself of any execution upon a judgment obtained upon a warrant of attorney or cognovit actionem; that is, he cannot take any further step to make the transaction effectual; and so with respect to bills of sale, where some further step is necessary to be taken by the party in order to make that instrument effectual, as by sale of the goods where the bill is an executory instrument, he cannot take that step. But where everything requisite has been done before the petition, the statute does not apply, as was held in *Hunt v. Robins*, and *Hardy v. Tingey*. In this case the instrument is not a power to sell, but is an absolute conveyance of the property, accompanied with an equity of redemption, and the transfer was complete before the filing of the petition. It is to be remarked that the language of the 21st section of this Act differs from that of the 61st section of the 1 & 2 Vict. c. 110, which is the corresponding clause in the prior Act. The words of the 61st section are, that no person shall avail himself "of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, or of such bill of sale, either by seizure and sale of the property of such prisoner or any part thereof, or by sale of such property theretofore seized, or any part thereof;" and for some reason the legislature has altered the language of the 21st section of the 7 & 8 Vict. c. 96. Probably they thought that the expressions "seizure and sale" were not applicable to such a security as a bill of sale, but to a warrant of attorney or cognovit only; and consequently, that those terms had been incorrectly introduced into the former statute. But the alteration in the language of the 21st

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section of the present Act does not make any difference with respect to the construction of that section here, for the legislature never intended that so gross a piece of injustice should be effected as to deprive a person of property of which he may have been in possession for years and years before the filing of the petition; but merely intended that all further proceedings on the instrument are to be stayed where some act is *necessary* to vest the property in the party, as in cases of executory bills of sale.

ALDERSON, B.—I am of the same opinion. I think that the true meaning of the clause is this—that a party is said to “avail himself” of a bill of sale, where he sells in order to obtain the property. Here the defendant did not so avail himself of it by the sale, for he merely sold the property which he had previously obtained.

PLATT, B., concurred.

Rule absolute.

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M'CORMICK v. PARRY and Another.

Feb. 11.

INTERPLEADER issue, to try whether certain goods and chattels seized under a writ of *fi. fa.*, upon the 3rd of May, 1851, were, upon that day, the property of the plaintiff or of the trustees of the Birkenhead Docks.

At the trial, before *Wightman*, J., at the last Chester Assizes, it appeared that, under the 7 & 8 Vict. c. lxxix., certain persons were incorporated as Commissioners for the purpose of "constructing Tidal Basins, a Dock, and other works at Birkenhead;" and by a subsequent Act, 11 & 12 Vict. c. cxliv., trustees were substituted for these Commissioners. By section 32 of the latter Act, the tidal basins, docks, walls, quays, and other works, which, under and by virtue of previous Acts, were vested in the Commissioners, and all land, houses, roads, quarries, and other hereditaments, properties, rights, and privileges whatsoever, vested in the Commissioners, were vested in the trustees; and all the plant, materials, tools, and other things, which, at the time of the passing of the Act, belonged to the Commissioners, were thenceforth to belong to and become the property of the trustees. The plaintiff was a contractor for a portion of the works in question; and having executed some part of the work, and pressing for payment or for some security

By the 7 & 8 Vict. c. lxxix., certain persons were incorporated as Commissioners, for the purpose of "constructing Tidal Basins, a Dock, and other works at Birkenhead;" and by the 11 & 12 Vict. c. cxliv., certain trustees were substituted for these Commissioners; and the property which was vested in the Commissioners by virtue of the former Act, was, by the subsequent Act, vested in the trustees. By the 39th section of the former Act, the Commissioners were empowered to borrow at interest, on the credit of the several rates and tolls by that Act granted,

and of any property which might be vested in the Commissioners *by virtue of that Act*, any sums of money, so that the amount owing by them did not at any one time exceed a certain specified sum; and for securing the re-payment of the monies so borrowed, the Commissioners might assign over the said rates, tolls, and property to the person who should advance or lend such money, as a security for the money so borrowed. By the 40th section, such mortgage was to be by deed duly stamped, &c., and might be according to the form given in the schedule to the Act. By the 41st section, such mortgagees were to be creditors on the rates or tolls and property equally. By the 43rd section, a register of such mortgages was to be kept, and to be open to inspection. By section 57, the Commissioners were empowered to purchase certain lands, and to agree with the parties interested in such lands for the purchase for a consideration in money, &c. After a portion of the works had been completed, the trustees, who were indebted to their contractor for the execution of a part of the works, by two several indentures assigned to him by way of mortgage all the plant, goods, machinery, and working materials in use in and about the docks. These deeds were not in the form given by the Act, nor were they registered:—*Held*, that, as the property assigned by these deeds was not such property as that contemplated by the 39th section of the first Act, but was property to which the trustees were entitled independently of the Act; and therefore that the trustees had an absolute control over it, and the mortgages in question were valid.

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from the trustees, the latter, by two several indentures, dated November 9th, 1850, and February 28th, 1851, respectively assigned to him by way of mortgage all the plant, goods, machinery, and working materials in use in and about the docks. Neither of these mortgages was in the form specified in the first Act, nor were they registered. The defendants subsequently issued a *fi. fa.* against the Company upon a judgment which they had recovered against them on a bond; and under this writ the sheriff seized the plant, goods, and materials which had been included in the two mortgages to the plaintiff. And after the usual proceedings this interpleader was directed.

It was contended, on the part of the defendants, that the deeds under which the plaintiff claimed were void: first, because they were mortgages, and were not in the form prescribed by the first Act, and because they had not been registered as required by that Act; and secondly, that, as the trustees were empowered to mortgage the property for advances of money only, and these mortgages were not for such an advance, they were void. Under the direction of the learned Judge, a verdict was found for the plaintiff, leave being reserved to the defendants to move to set that verdict aside, and to enter a verdict for them.

In Michaelmas Term last, *Atherton* obtained a rule nisi

several sections of the 7 & 8 Vict. c. lxxix. It will be contended for the defendants, that the property in question

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Sect. 39. "That it shall be lawful for the Commissioners, from time to time, to borrow at interest on the credit of the several rates and tolls by this Act granted, and of any property which may be vested in the Commissioners by virtue of this Act, any sum of money which shall not exceed the sum of 400,000*l.*, and in the event of any part of such sum of money being repaid by the Commissioners, to re-borrow the same, and so *toties quoties*, but so, nevertheless, that there shall not be owing on the security aforesaid, any more than the sum of 400,000*l.* in the whole at any one time; and for securing the repayment of the monies so borrowed, with interest, the Commissioners, or any five of them, may assign over the said rates, tolls, and property, or any part thereof, to the person who shall advance or lend such money, or his trustee, as a security for the repayment of the money so to be borrowed, together with interest for the same."

Sect. 40. "That every such assignment or mortgage shall be by deed duly stamped, in which the consideration shall be truly stated, and every such deed shall be under the hands and seals of five of the Commissioners, and may be according to the form in Schedule (A.) to this Act annexed, or to the like effect."

Sect. 41. "That all persons to whom such mortgages or assignments shall be made, or who

shall be entitled to the monies thereby secured, shall, in proportion to the sums therein respectively mentioned, be creditors on the said rates, tolls, or property, equally one with another, without any preference in respect of the priority of advancing such monies, or of the dates of any such assignments respectively."

Sect. 42. "That the expenses of every assignment or mortgage shall from time to time be defrayed by the Commissioners out of the money raised by the same."

Sect. 43. "That a register of such mortgages or assignments shall be kept by the Clerk to the Commissioners, and within fourteen days after the date of any such mortgage or assignment, an entry or memorial of the number and date thereof, and of the names of the parties thereto, with their proper additions, shall be made in such register; and such register may be perused at all reasonable times by any person interested therein, without fee or reward."

Sect. 57. "That, subject to the provisions of this Act, it shall be lawful for the Commissioners to purchase the lands described in the Schedule (C.) to this Act annexed, and to agree with the parties interested in such lands for the absolute purchase thereof, for a consideration in money, or such parts thereof as they shall think proper, and of all subsisting leases therein, and of all rent-charges, annuities, mortgages or incumbrances, affecting any such

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was vested in these trustees by virtue of that Act, by the provisions of which the trustees are enabled to mortgage the property for a particular purpose and in a specified form; and that these instruments are void, as being in contravention of the statute. The answer to that objection is, that the goods and chattels in question, which constitute the *working plant* of the trustees, are not such property as is contemplated by the Act. By the 39th section, the Commissioners are empowered to borrow money "on the credit of the several rates and tolls" granted by the Act, "and of any property which may be vested in the Commissioners *by virtue of this Act.*" The 40th section says, that the form of the mortgage "may" be according to the form in the schedule. The 41st section enacts, that the mortgagees under such instruments shall come in equally with the other creditors. The 43rd section enacts, that a register of such mortgages shall be kept, which shall be open to inspection. Now the property which becomes vested in the Commissioners by virtue of the Act, is real property. That appears by the 57th section. But the Act does not apply to goods and chattels which the Commissioners acquire as *owners*, and of which they are possessed just as any other owners of moveable property. If they cannot mortgage them, neither can they absolutely sell them, even when, by the completion of the works they are no longer

wanted. [*Martin*, B.—The defendants will perhaps rely upon the 151st section.] That section has no operation until after the works have been completed. [*Alderson*, B.—That section, moreover, contains an enumeration of such machines as are always affixed to the freehold.] And consequently they could not be seized under a writ of *fi. fa.* It was not disputed that the things seized were goods and chattels, and they were treated as such by the defendants. Secondly, even if this be such property as is contemplated by the Act, the 43rd section is merely directory. It does not contain any negative words, but merely says that the instrument “may” be in a particular form.

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Davison in support of the rule.—Great powers are intrusted to these trustees, both of borrowing money and of taking land. It seems to have been intended that all incumbrances upon their property should be placed upon the same footing. The property mentioned in these deeds was essential to the construction of the works, and vested in them by virtue of the Act. [*Alderson*, B.—It would be a great impediment to the progress of the works, if the trustees were prohibited from disposing of the tools by sale or mortgage. Suppose they had expended 5000*l.* in tools, and some new machine were invented by which the work could be done with greater rapidity and cheapness, it would be a great inconvenience and hardship to the trustees, if they were not permitted to sell the old tools in order to purchase the new machine.] The Act ought to be construed strictly, inasmuch as the powers intrusted to these parties are very extensive: *Fairtitle v. Gilbert* (a), *Pontet v. Basingstoke Canal Company* (b).

PARKE, B.—I am of opinion that the rule ought to be

(a) 2 T. R. 169.

(b) 3 Bing. N. C. 433.

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discharged. The question arises on an interpleader issue, which is directed in consequence of the claim made by the plaintiff on the sheriff, who seized the goods and chattels for the bond of the corporation. And the sole question is, whether the goods and chattels seized under that execution, or any of them, are the property of the plaintiff or of the corporation. The plaintiff claims under two deeds of mortgage, one of the 9th of November, 1850, by which the corporation conveyed all the machinery used in constructing the works, in order to secure the due payment to him by instalments of the sum agreed to be paid to him by them for the work. He claims certain of the goods and chattels under that deed. And under a further deed of the 28th of February, 1851, in which other goods are conveyed to him for a certain advance therein mentioned, by which deed the trustees convey to him the workshops, implements, &c., other than those which are transferred by the former deed. And the question is, whether both these deeds, or either of them, be void. It is contended that they are void, because the corporation had no power to mortgage such property as this under the 7 & 8 Vict. c. lxxix. By the 39th section of that Act, which gives the enabling power, they are empowered to borrow money at interest on the security of certain property. That

rates and tolls, and such property as is vested in the Commissioners by virtue of the Act alone. But the Act does not preclude them from doing what they please with property which they do not acquire by virtue of the Act. They may sell it or mortgage it at their option. But then it is said, on the part of the defendants, that the Act does apply to all such matters as are useful in carrying on the works. I think, however, that there is no such exception. The Commissioners are the proper judges of what is useful for carrying on the works. And although it is necessary for them to have many implements, it does not follow that they cannot sell an implement they have acquired, and purchase a new one with the produce of the sale. I am therefore of opinion that both these deeds are operative, and that the plaintiff was entitled under them to the property specified in them.

ALDERSON, B.—I am of the same opinion. The property vested in the Commissioners under the Act is property which, but for the Act, could not vest in them. The 39th section gives power to mortgage the tolls, which they have not done here. A mortgage of the tolls must be made in accordance with the forms and provisions required by the Act; one of these provisions being, that there shall be no priority of one mortgage over another; and for that purpose the mortgage is to be registered. But the Act applies only to that property.


PLATT, B. — The power given by the 39th section of the first Act seems to me to be limited to the incumbrances on land acquired by the Commissioners for the permanent use of the Company, and the profits arising therefrom, that is to say, the incumbrances of the concern itself, when acquired. Now the goods in question and chattels, that is, tools and machinery, are property acquired for the purpose of effecting this permanent condi-

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tion of the land, and are the property of those persons who bought them or constructed them; and if these goods and chattels do not fall within the 39th section, the trustees may sell them, or mortgage them, or deal with them as they please. My Brother *Parke* has already suggested what I was about to allude to, that this property formed no part of the subject-matter of the trust, as being a burden on the land. I therefore think that this rule ought to be discharged.

MARTIN, B.—I am clearly of the same opinion. At law these trustees may acquire property in goods, and they may sell them, or mortgage them, or deal with them as any other owner of property may. And the question is, whether they are prohibited from so doing by the 39th section of the 7 & 8 Vict. c. lxxix. Now, by that section, they are authorised to borrow at interest, on credit of the rates and tolls on the property vested in them by virtue of the Act, any sums of money not exceeding in the whole a certain fixed amount. I am of opinion that these goods are not property vested in the Commissioners by virtue of the Act. By the Act, the Company are authorised to buy land, which is vested in them for the purposes of the docks and of the various works incidental to that object. The 125th section gives the right to make the docks



docks. I am therefore clearly of opinion that the subject matter of these mortgages is not within the 39th section, and that this rule ought to be discharged.

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Rule discharged.

WOODS v. FINNIS and Another.

Feb. 21.

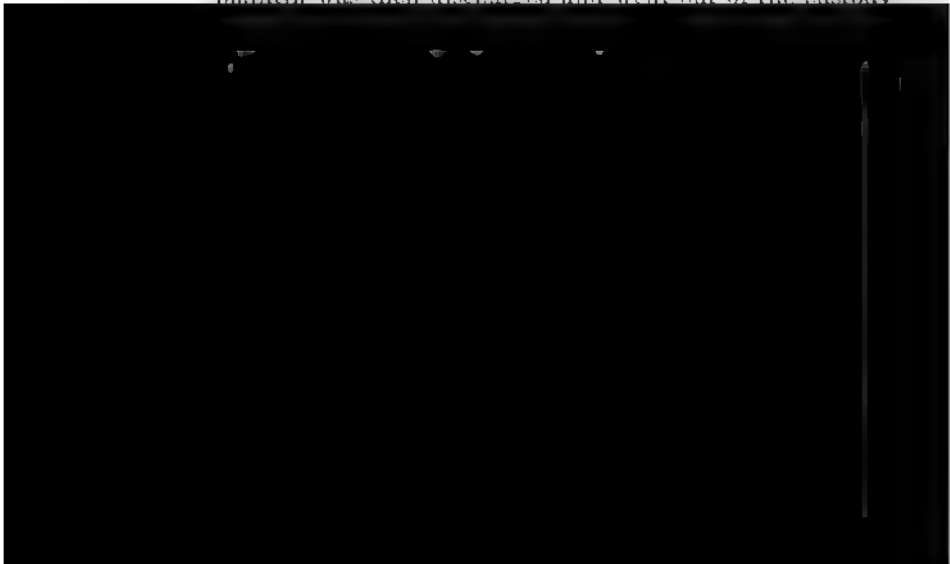
CASE against the defendants as Sheriff of Middlesex. The declaration stated, that a judgment had been obtained by one J. Foot against the now plaintiff, for 67*l.* 15*s.* for damages, whereupon J. Foot sued out of the Court of Exchequer a writ of testatum capias ad satisfaciendum, directed to the sheriff of Middlesex (the defendants), which commanded the said sheriff to take the plaintiff, and him safely keep, so that he might have his body before the Barons of the Exchequer, &c., to satisfy the said J. Foot the damages aforesaid recovered, together with interest on the said sum of 67*l.* 15*s.*, which writ was delivered to the defendants to be executed in due form of law; by virtue of which writ the defendants, as such sheriff, arrested the now plaintiff, and had him in custody before the return of the writ; yet the defendants, so being such sheriff, and not regarding the duty of their office as such sheriff, afterwards, and whilst the now plaintiff was so in their custody under the said writ, and before they would discharge him therefrom, to wit, on the day and year aforesaid, wrongfully, maliciously, illegally, and oppressively, and by colour of their office as such sheriff, demanded, extorted, had, received, and took, of and from the now plaintiff, as and for fees due and payable by the now plaintiff to the now defendants as such sheriff, the sums of money following: to wit, the sum of 1*l.* 1*s.* as and for the officer's fee for executing the said writ, the sum of 3*s.* 6*d.* for searching the office for other writs

It is no part of the duty of the sheriff, in executing a writ of *ca. sa.*, to receive the amount of the debt and costs, in order to pay them over to the execution plaintiff. And therefore, where the debtor makes a *voluntary* payment to the *bailiff* of the debt and costs, to be paid over to the execution plaintiff, and the bailiff fails to do so, and, in consequence thereof, the debtor is a second time arrested under a fresh writ issued upon the same judgment, the sheriff is not liable as for a breach of duty in not paying over the money to the execution plaintiff. *Semble*, that, in such case, the debtor's remedy is by action against the bailiff for breach of contract.

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against the now plaintiff, and the sum of 4s. 6d. for a discharge fee; whereas the said sums of money were not, nor were any nor was either of them, nor was any part thereof, nor was any fee or sum of money whatever, due or payable from the now plaintiff to the now defendants. The declaration then proceeded to allege as a second breach, that after the arrest, and while he, the plaintiff, was in the custody of the defendants as such sheriff, under the said writ, to wit, on &c., he, the plaintiff, paid to the defendants, so being and as such sheriff, the amount of the damages and interest mentioned in the said writ, to wit, 68*l.*, to be paid by the now defendants, so being and as such sheriff, to the said J. Foot, in satisfaction of the said damages and interest; and the now defendants, so being and as such sheriff, under colour of the said writ, then received of and from the now plaintiff the said sum of money, to wit, &c., for the purpose aforesaid, and thereupon then, upon payment of the said sums of money, to wit, the said sum of 68*l.*, and the said sums of 1*l.* 1*s.*, 3*s.* 6*d.*, and 4*s.* 6*d.*, so demanded, extorted, had, and received by the now defendants as and for fees aforesaid, the now defendants discharged the now plaintiff from their custody under the said writ, and suffered and permitted him to depart out of custody and go at large wheresoever he would, and the plaintiff was then discharged and went out of the custody



reasonable time in that behalf, which had elapsed long before the arrest and imprisonment of the plaintiff as hereinafter mentioned, pay the said sum of money, to wit, 68*l.*, or any part thereof, to the said J. Foot, but wrongfully, and maliciously, and corruptly, neglected so to do, and retained and kept the said sum of money in the hands of the now defendants for their own use and benefit, for a long and unreasonable time, to wit &c.; in consequence of which the plaintiff was again arrested on a fresh writ of *ca. sa.*, issued by the said J. Foot upon the same judgment, directed to the defendants as sheriffs of the City of London, whereon the plaintiff was then detained by the defendants, then being and as such sheriffs of the City of London, for the space of forty-eight hours then next following, and until the now defendants, after the last-mentioned arrest, to wit, &c., paid to the said J. Foot the said sum, to wit, 68*l.*, in satisfaction of the damages and interest aforesaid; and the now plaintiff was also, by means of the premises, forced to and necessarily did expend divers monies, and incur divers debts, &c., in obtaining his discharge.

The defendants pleaded not guilty, and other pleas traversing all the material allegations in the declaration.

At the trial, before *Martin*, B., at the Middlesex Sittings in last Easter Term, it appeared that, on the 23rd of June, 1849, the plaintiff was arrested on a *ca. sa.*, founded on a judgment, at the suit of one J. Foot, mentioned in the declaration, and indorsed to levy 67*l.* 15*s.*, by White, a sheriff's officer, under a warrant from the defendants, the sheriff of Middlesex. The plaintiff sent to his attorney, Mr. Webb, to have the money paid, who sent a cheque for 75*l.* to White, the sheriff's officer. The plaintiff was then discharged, but the officer did not pay the amount of the debt and costs claimed to Foot. Foot issued another writ of *ca. sa.*, founded on the same judgment, into London, on which the plaintiff was arrested on the 3rd of August following, and was detained at Whitecross-street prison until

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the following morning, when, and not before, White paid the amount of the debt and costs to Foot, he having wilfully kept the money in his own hands in the meantime.

A verdict was found for the plaintiff, and damages were assessed on the first breach at 1*l.* 9*s.*, and at 50*l.* on the second breach. A rule nisi was subsequently obtained, pursuant to leave reserved, to reduce the damages to 1*l.* 9*s.*, on the ground that the defendants were not liable for the act of White; and also in arrest of judgment on the second breach, on the ground that that breach was founded upon a breach of contract only, which could not properly be made the subject of an action on the case.

In last Hilary Term (January 12)

James, Willes, and Hawkins, shewed cause.—First, the sheriff is liable for the consequences arising from the neglect of his officer, in not paying over the money received by the latter on the execution of the writ. The officer to whom the execution of the writ is intrusted by the sheriff is a mere agent; in truth, the liabilities of a sheriff for the acts of his officer, done in the execution of the writ, exceed the liabilities of an ordinary principal for the acts of his agent; for the sheriff is responsible for tortious acts done out of the course of the officer's duty, but done under

the law subjects the sheriff, from whom he derives that authority." In case of extortion by the bailiff, the sheriff is liable: *Woodgate v. Knatchbull* (a). So also where, under a writ of fi. fa. against the goods of A., the bailiff takes the goods of B.: *Ackworth v. Kempe* (b). [Parke, B.—In *Smart v. Hutton* (c), the sheriff was held liable in trespass for the arrest of the plaintiff by the bailiff under a writ of fi. fa., on the ground that it was an act done under colour of the writ; and that, as the officer was delegated by the sheriff to execute the writ, the acts of the officer were, in point of law, the acts of the sheriff.] Upon this general principle the case of *Raphael v. Goodman* (d) proceeded. There, Lord Denman, C. J., laid it down broadly, that "there is no doubt that in all matters relating to the execution, the sheriff's officer is the same as the sheriff." But it will be contended on the part of the defendants, that it was no part of the duty of the sheriff here to receive the money, and therefore that the defendants are not liable for the neglect of the bailiff who received it, in not duly paying it over. This point was touched upon in *Woodman v. Gist* (e), where *Littledale, J.*, said, "I must own, it appears to me that in this instance the officer acts for the sheriff. It was not in the regular discharge of his duty to receive this money; but if he has received it, he received it for the sheriff, and the sheriff is answerable." The sheriff, therefore, is responsible for the misconduct of the officer whom he has appointed to fulfil an important duty, and the case is the same as if the sheriff had themselves received the money from the injured party.

Secondly, as to the objection in arrest of judgment. It is said that if the second breach discloses any cause of action, it is for a breach of contract; and therefore that it is improperly made the subject matter of an action on the

(a) 2 T. R. 148.

(b) Dougl. 40.

(c) 8 A. & E. 568, n.

(d) 8 A. & E. 565.

(e) 8 C. & P. 213.

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case. In many instances *case* lies where *assumpsit* might be maintained; as, for example, where goods are bailed: *Coggs v. Bernard* (a); in actions against carriers for the non-delivery of goods, *Wyld v. Pickford* (b), although the action be founded upon a breach of contract. So, *case* lies for a breach of warranty: *Williamson v. Allison* (c). See also *Brown v. Boorman* (d). [Parke, B., referred to *Courtenay v. Erle* (e).]

Bramwell and *Quain* in support of the rule.—First, the defendants are not liable for this act of the bailiff. The declaration states that the defendants “as sheriff” received the money. If the character of the defendants, in which they are alleged to have received the money, is to be considered as immaterial, the allegation is not proved, for it was not shewn that any express authority was given by the defendants to the bailiff to receive the money. Then the question is, whether such authority can be implied by law in the present case, from the relation which exists between the defendants and the bailiff. Now a sheriff is only liable for those acts of his officer, which are done in the execution of the writ, or which are done under colour of it, as for extortion, oppression, and the like. But it is no part of the duty of a sheriff to receive the amount of the debt and costs on a *ca. sa.* *Slackford v. Austen* (f), and

special agent for the purpose of paying the amount over to the execution plaintiff: *Ford v. Leche* (a). He was not the agent of the sheriff: *Cook v. Palmer* (b). The plaintiff might have sued the bailiff for the non-performance of the agreement. The sheriff could not have maintained an action for money had and received against the bailiff, but he might have sued the present plaintiff for an escape: Com. Dig. "Escape" (E). If the bailiff is liable, the sheriff is not (c). The bailiff was not guilty of extortion, for the payment was not made under colour of the writ. The plaintiff was bound to know the law, and he must, therefore, be taken to have known that it was his duty to pay the money to the execution plaintiff and not to the sheriff. In *Underhill v. Wilson* (d), the sheriff was held liable on the ground that he had ratified the act of his officer; and in *Crowder v. Long* (e), and *Raphael v. Goodman* (f), the decisions proceeded on the ground that the acts complained of were the tortious acts of the bailiff, and done under colour of the writ. Upon this point the several cases are collected in *Brown v. Copley* (g). *Woodman v. Gist* (h), which has been relied upon, is distinguishable, for there it was the duty of the sheriff to receive the money.

Secondly.—The second breach is bad. The alleged misfeasance of the defendants is founded upon a breach of contract merely; as it is not the duty of the sheriff, *virtute officii*, to receive and to pay over the money to the execution plaintiff. This is not a bailment, in which case an action on the case might lie for the neglect of the bailee in delivering a particular chattel. In *Brown v. Boorman* (i), the count was supported on the ground that case lies

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(a) 6 A. & E. 699.

(b) 6 B. & C. 739.

(c) 12 Mod. 488.

(d) 6 Bing. 697.

(e) 8 B. & C. 598.

(f) 8 A. & E. 365.

(g) 7 M. & Gr. 558.

(h) 8 C. & P. 213.

(i) 11 Cl. & F. 1.

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wherever there is a breach of duty in the course of the employment of the party. The second breach is therefore bad, as being improperly founded on a mere breach of contract.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was argued before my Lord Chief Baron, and my Brothers *Alderson* and *Martin* and myself, a few days ago, on shewing cause against a rule to enter a verdict for the defendant, on a point reserved by my Brother *Martin*, or in arrest of judgment. [His Lordship stated the pleadings, and proceeded:]—A verdict was found for the plaintiff on the first breach, as to which there was no objection on the trial. As to the second breach, it appeared [his Lordship stated the facts, as set forth at page 365, and proceeded:]—The second breach was for the supposed breach of duty in the sheriff in not paying over the money to the execution plaintiff, and damages were separately assessed upon it.

No question arises as to the sum which was paid for fees improperly claimed from the plaintiff. That was clearly a demand for which the sheriff was responsible, and the propriety of the verdict was therefore not disputed; but it was contended on the part of the defendants, that they

that there was no consequent duty in the defendants to pay it over in a reasonable time to the execution plaintiff.

There is no doubt that the sheriff is liable for all acts done, and neglects of duty, by the bailiff in the execution of a writ, on the ground that if the sheriff thinks fit to commit the execution of a writ, which he is bound to execute, to another, he is responsible if that person does not execute it properly, and is in the same condition as if he had executed it himself: *Parrott v. Mumford*(a); the case of a sheriff differing in this respect from the liability of an ordinary principal for the acts of an agent who does not pursue the authority committed to him. Therefore, if a sheriff's officer arrests a wrong person, or arrests the right person after the return day, or takes a wrong person's goods under a fi. fa., or even if he arrest under a writ of fi. fa., or is guilty of extortion in insisting on being paid a sum of money as the price of liberation from imprisonment under a ca. sa., the sheriff is liable. Though none of these acts are done *in pursuance* of the authority of the writ, yet they are done in the execution, or, as it is said, *under colour of it*; and the sheriff is exactly in the same position as if he had done those acts himself. So, if the sheriff's officer permits the defendant to go at large on paying to him the sum mentioned in the writ, the sheriff would be liable for an escape; for it is a neglect of duty by the officer, seeing that the writ commands the sheriff to have the body of the debtor at the return *to satisfy the plaintiff*, and not *to pay* the debt to the sheriff; and in that respect his duty upon the ca. sa. differs from that under a fi. fa., by which the sheriff is directed to make a sum out of the goods and chattels of the defendant, and *himself* to have that money at the return; so that, in the latter case, the defendant is discharged by payment to the sheriff, and the sheriff becomes debtor to the plaintiff; in the

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(a) 2 Esp. N. P. C. 585, cor. *Eyre*, C. J.

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former, he is discharged by payment to the plaintiff alone; and the sheriff, by receiving the money, has no right to substitute his responsibility for that of the debtor, whose body the creditor has a right by law to keep until the debt is paid to him. The authorities are very full and clear upon this point: *Tailer v. Baker* (a), *Slackford v. Austen* (b), *Stringer v. Stanlack* (c). Therefore, the receipt of the money by the sheriff, and its payment to the execution creditor, is no part of his duty in the execution of the writ. The defendant himself must pay it to the plaintiff in order to obtain his discharge, and he cannot impose that duty on another, except by contract with him as his agent. In this case, then, the present plaintiff cannot succeed against the sheriff, except by shewing a contract on his part wholly dehors his duty in executing the writ. The contract was in this case made by the bailiff, and he has no power to bind the sheriff by entering into any contracts on his behalf. The contract binds the bailiff himself, no doubt, as it would any other person who should undertake to carry money and pay it for the defendant to the plaintiff or any other person; but it does not bind the sheriff, because for this purpose the bailiff had no authority. The verdict must therefore be entered for the defendants on the second breach.

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STANSFELD *v.* HELLAWELL and Others.

Feb. 9.

DEBT on bond.—The first count of the declaration was upon a bond dated the 10th of May, 1849, in the penal sum of 1759*l.* 15*s.* 2*d.* The defendants set out this bond on oyer, by which the defendants were jointly and severally bound to the plaintiff, described as Judge of the County Court of Yorkshire at Huddersfield, in the said sum. The condition of the bond was, that the defendant Hellowell should prosecute a certain plaint which had been entered in that court in replevin, wherein he was plaintiff, and A. Eastwood and J. R. Machan, trustees of the estate of one T. R. A., and W. Hindle, were defendants, with effect and without delay, and prove before the Court by which such suit should be tried, that there was ground for believing that the rent or damage in respect of which the distress had been taken was more than 20*l.* The plea then alleged that, before and at the time of the making of the writing obligatory, &c., the said county court was duly established, constituted, and holden under the 9 & 10 Vict. c. 95, and that the plaintiff was judge thereof, and that the said plaint was a plaint in an action of replevin brought in respect of a distress for rent in arrear, in which the said W. H. Hellowell was plaintiff, and the said A. Eastwood and others were defendants; that, after the entry of the plaint &c., in the county court, and before the making of the writing obligatory, to wit, on the 10th of May, 1849, W. H. Hellowell, in order to obtain a removal of the said plaint into one of the superior Courts, declared to the county court and to the plaintiff, as and then being the

On the removal of a replevin suit from a county court into a superior Court, under the 9 & 10 Vict. c. 95, ss. 121 & 127, the judge of the county court, instead of taking the bond to the other party to the suit, as required by the 127th section, took it to himself as his trustee. The suit was prosecuted in the Court above, but without effect, and the bond thereupon became forfeited, and the judge of the county court brought an action upon the bond:—

Held, first, that the preliminaries required to be observed by the 121st and 127th sections were not conditions precedent to the validity of the bond, and that it was valid as a voluntary bond.

Secondly, that the irregularity in the proceedings, in

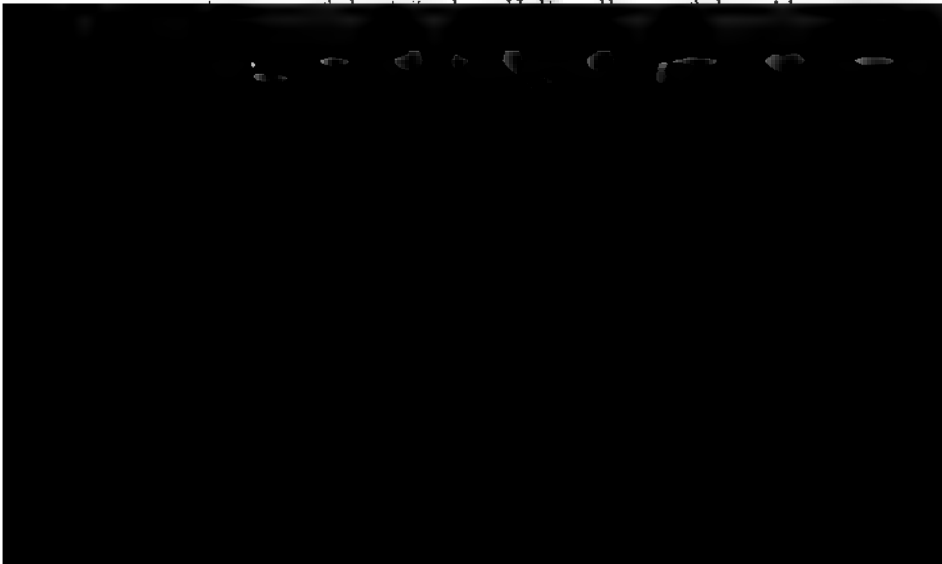
not removing the suit by a certiorari founded on a proper bond, had been waived by the proceedings taken in the Court above.

Thirdly, that the obligee of the bond was entitled to recover in the action upon it, as trustee of the party for whom he took it, all the costs incurred by the latter in the replevin suit.

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judge thereof, that the rent in respect of which the distress was taken was more than 20*l.*; and thereupon then, instead of becoming bound with two sufficient sureties, in the manner as required by the statute, to prosecute the suit with effect and without delay, and to prove before the Court in which such suit should be tried, that there was ground for believing that the rent was more than 20*l.*, as a preliminary to such removal of the suit out of the county court, the defendants made and entered into, and the plaintiff accepted from them *illegally*, the said writing obligatory as an inducement to the plaintiff to assent to such removal of the said plaint, and to make a return to any writ of certiorari which the said W. H. Hellawell should procure for so removing the said plaint, and which writing obligatory was so as aforesaid made to *the plaintiff* instead of being made to *the other party* in the said plaint, to wit, the said A. Eastwood and others, contrary to the form of the statute, &c.—Verification.

The plaintiff replied to this plea, by admitting the due establishment of the county court, and that he was the judge, as alleged, with a traverse de injuriâ absque residuo causæ, &c. Then followed an assignment of breaches, according to the statute, that, after the making of the said writing obligatory, the said plaint was duly removed, at the



and on behalf and for the benefit of the defendants in the original cause.

At the trial, before *Platt*, B., at the last York Assizes, it appeared that the judge of the county court had taken the bond to himself on the removal of the plaint, and that he sued upon it merely as trustee for the defendants in the court below. On the part of the defendants it was contended, that, as the plaintiff had not sustained any damage as judge of the county court, the damages at the most ought to be merely nominal. The learned Judge directed the jury to assess the damages to the amount of the costs sustained, and awarded to the defendants in the court below, in the replevin suit in this Court, with leave to the defendants to move to reduce the damages to a nominal sum.

In last Michaelmas Term, *Watson* obtained a rule nisi to reduce the damages accordingly, or to arrest the judgment, on the ground that the bond, having been improperly taken by the judge of the county court, was void.

In the present Sittings (Feb. 7),

Hugh Hill and *Cowling* shewed cause.—First, as to the objection in arrest of judgment. The bond is valid. This question turns upon the true construction of the 121st & 127th sections of the 9 & 10 Vict. c. 95 (a). It will be con-

(a) Sect. 121 enacts, "That in case either party to any such action of replevin shall declare to the Court in which such action shall be brought, that the title to any corporeal or incorporeal hereditament, or to any toll, market, fair, or franchise, is in question, or that the rent or damage in respect of which the distress shall have been taken is more than the sum of 20*l.*, and shall become bound, with two sufficient sureties, to be approved

by the clerk of the court, in such sums as to the judge shall seem reasonable, regard being had to the nature of the claim, and the alleged value or amount of the property in dispute, or of the rent or damage, to prosecute the suit with effect and without delay, and to prove before the Court by which such suit shall be tried, that such title as aforesaid is in dispute between the parties, or that there was ground for believing that the said rent

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tended by the defendants, that the preliminaries required by the statute on the removal of the replevin suit were not complied with, and consequently that the bond is void. But the 127th section is merely directory: it does not contain any negative words. In this respect it differs from the 121st section. The words "and not otherwise," to be found in the 121st section, are omitted in the 127th. In order to construe the 127th section as obligatory, it ought either to contain negative words, or the language ought to be capable of such a construction that a negative may be inferred therefrom.—Com. Dig. "Parliament," R. 23 & 25: *Rex v. Pinney* (a); *Cole v. Green* (b). If, however, the preliminaries to the removal of the cause are to be considered as merely irregular, as the cause has been removed de facto, the superior Court has jurisdiction over it, until either a procedendo is issued or a writ of error is brought, as in the case where an infant improperly sues by attorney. But this objection is not open to the defendants, for they have acted under the bond. It will, moreover, be contended that the bond is void in having been made to the judge of the county court, and not "to the other party to the action," as required by the 127th section. But these

or damage was more than 20*l.*, shall be approved by the judge, then, and not otherwise, the ac- and attested under the seal of the

words apply to the removal of the suit, and that section does not direct to whom the bond shall be made. In many analogous cases, bonds required by statute have been held valid, although such instruments have not strictly followed the terms of the particular statute by which they were required. Thus, a replevin bond, with one surety only instead of two, as required by the 11 Geo. 2, c. 19, s. 23, may be sued upon: *Austen v. Howard* (a), *Dunbar v. Dunn* (b), 1 Wms. Saund. 195 h, note (a). In *Dunbar v. Dunn*, it was held that the assignee might sue upon the bond, although it was not conditioned "to prosecute the suit without delay." In *Edmonds v. Challis* (c), the several cases upon this point were considered. So in the case of administration bonds, the Courts have held the bonds valid, although not in strict conformity with the statute: *Folkes v. Docminique* (d). The decisions upon administration bonds are all collected in 1 Williams on Executors, Part I. Book V. c. 4.

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Secondly, the breach contains a sufficient allegation that the plaintiff sues as trustee, for it is stated that "the plaintiff prosecutes the present action *for and on behalf and for the benefit*" of the defendants in the original action, and this is supported by proof that the plaintiff took the bond as their trustee merely; and consequently he is entitled to recover upon this bond all such damages as the defendants below would have been entitled to, if the bond had been made to them, and they were now suing upon it.

Watson and Hall in support of the rule.—The 121st and 127th sections are to be read as one enactment. This bond contravenes the express provisions of the statute, and is void. In all the cases cited, the party to whom the bond was made was the person entitled to it under the statutes by which the bond was required.

(a) 7 Taunt. 28.

(b) 10 Price, 54.

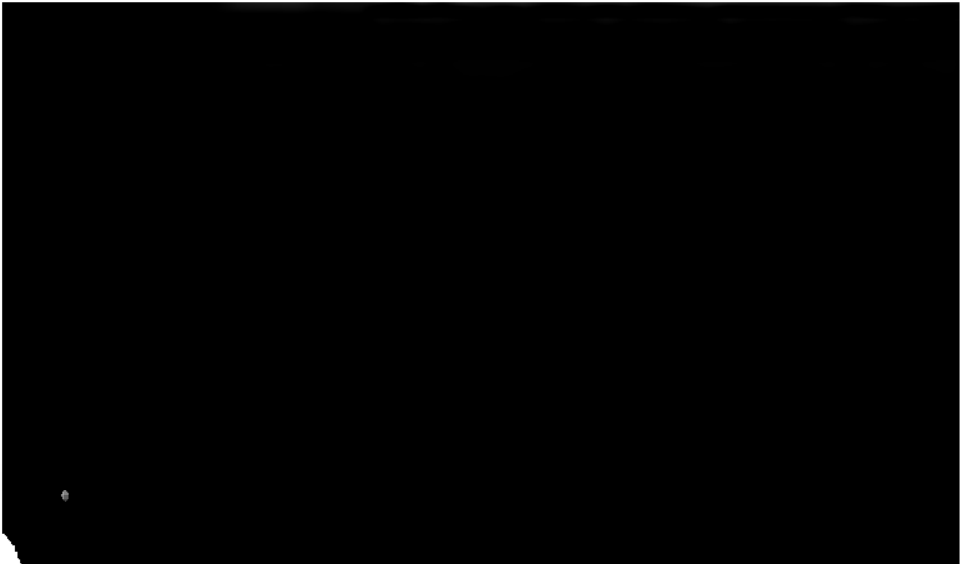
(c) 7 C. B. 413.

(d) 2 Str. 1137.

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The mode in which the bond is to be made is pointed out by this statute, which expressly enacts, that the action shall be removed in the mode specified, "*and not otherwise.*" Now the bond is to be made "to the other party." The judge, therefore, in taking the bond himself, acts in contravention of the statute; for it is his duty to require certain formal proceedings to be duly observed. He acts in a judicial character. The duty of a sheriff in taking a bond is very different from that of a judge of a county court, for he takes the bond to indemnify himself against responsibility to the opposite party in the event of a miscarriage, and he therefore acts ministerially: *Wright v. Lord Verney* (a). The act of the judge in taking the bond to himself is contrary to the express requirements of the statute, and is void. Upon this principle, bonds in several cases have been held void: *Morris v. Chapman* (b), *Martyn v. Blithman* (c), *Beaufage's case* (d).

Secondly, the plaintiff, as judge of the county court, has not sustained any substantial damage. The record does not shew that he took the bond as trustee for the defendants below. The defendants may have given another and a proper bond to the other party, according to the statute. If so, they could not in the present action have availed themselves of that fact by plea.



that this was done *illegally*, was disproved, and the verdict was properly found for the plaintiff on that plea; and therefore the question as to the validity of the bond arises wholly upon the record. We are of opinion that the preliminaries pointed out in these sections of the statute are not imposed as a condition precedent to the validity of the bond which they require to be taken. The only consequence of not complying with those preliminaries is, that the cause is not properly removed. The bond itself is not thereby rendered void, but is good as a voluntary bond, and may be sued upon by the obligee. This bond is therefore good, and the rule in arrest of judgment must be discharged.

The remaining question is, what amount of damages the plaintiff is to have. Now this is not an objection on the record, for there is a proper suggestion of breaches, the condition of the bond having been clearly broken; so that the amount of damage which the plaintiff has sustained is a question for the jury. On the facts of this case, there is no doubt ample evidence to shew that the judge of the county court took the bond as a trustee for the opposite party in the suit, and that the damages he may recover will be for the benefit of that party. It is clear that, being trustee, he is entitled to recover the full amount of the costs to which the party for whom he is trustee is put. We are therefore of opinion that the plaintiff must be considered as having sustained damages to the full amount of the costs sustained by the defendants below in the replevin suit, and consequently that the rule to reduce the damages ought also to be discharged.

There can be no doubt that the suit was improperly removed from the county court. But the superior Courts have the right to try replevins properly brought before them; and here the mere irregularity in not removing the suit by a proper mode, i. e., by a certiorari grounded on the proper bond, has been waived by the party declaring in the Court above, and by that Court proceeding to judg-

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ment. The proceedings were therefore coram judice, though irregularly brought here; but that irregularity has been waived.

Rule discharged.

Feb. 21.

OUTHWAITE, Appellant; HUDSON, Respondent.

A plaintiff in a county court has a right to be nonsuited at any time before the jury have delivered their verdict, or, if the cause be tried by a judge alone, at any time before the judge has delivered his judgment.

As a general rule, the successful party in an appeal is entitled to costs.

Where the plaintiff, before verdict, applied to be nonsuited, which the judge refused, but not that

THIS was an appeal from the decision of the Judge of the County Court of Yorkshire. It was an action for the breach of a warranty of a horse; and at the trial, which was held at Leeds, after the judge had directed the jury, and whilst they were deliberating upon their verdict, the plaintiff stated that he elected to be nonsuited. To this the defendant objected; and the judge said that he thought that, as the case had been left to the jury, the application was too late, and that he would therefore take the verdict, but reserve leave to the plaintiff to move to set the verdict aside, and to enter a nonsuit. The jury found a verdict for the defendant. The plaintiff never moved to set aside the verdict pursuant to the leave reserved, but appealed to this Court.

The question submitted was, whether the county court judge was bound, in point of law, to nonsuit the plaintiff.

decision as to entering a nonsuit is a mere matter of practice. There is a great distinction between the two: *Cherry v. Powell* (a). The county court judge has the power of ordering the practice of his court, and he is not bound to adopt that of the superior Courts. The 9 & 10 Vict. c. 95, s. 78, gives him a discretion in matters of practice. [*Parke, B.*—This is not a mere matter of practice, but is an important question of law. The legislature did not intend that the subject should be deprived of his right of trying his cause over again. The recent decision of this Court, in *Robinson and Lawrence* (b), surely decides this point.] At all events, the appellant is not entitled to costs, for he has been guilty of a vexatious proceeding by coming here instead of moving to set aside the verdict according to the leave given him by the judge.

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PARKE, B.—The judge of the county court was wrong in refusing to allow the plaintiff to be nonsuited. At common law, the subject has a right to be nonsuited at any stage of the proceedings he may please, and thereby to reserve to himself the power of bringing a fresh action for the same subject-matter. The legislature did not, by the 9 & 10 Vict. c. 95, intend to deprive a plaintiff, who sues in a county court, of this right, or to take away from these courts the power of nonsuiting, which is incidental to every Court. The plaintiff's power of demanding to be nonsuited continued to the last moment—until the jury had given their verdict; or, where the case is tried by a judge without the intervention of a jury, until the judge had pronounced his judgment. Then, with respect to the question of the costs of this appeal: We have laid it down as a general rule to allow the successful party his costs of appeal; and I believe that the other Courts have adopted that rule. It is not, of course, an *inflexible* rule, and may

(a) 1 Dowl. & Ry. 50.

(b) Ante, p. 123.

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be relaxed in cases of vexation. In the present instance, we are asked to depart from it, on the ground that the judge of the county court reserved to the plaintiff leave to move to enter a nonsuit, and the plaintiff might therefore have got a decision upon the question without the expense of coming here. But I do not think that the plaintiff was bound to try the experiment of going a second time before the same judge, who had already pronounced an opinion against him; as the judge might have adjourned the cause, and have taken time to consider the point, if he felt any difficulty upon it. In this case, therefore, the ordinary rule must be followed. The appellant will have the costs of the appeal.

PLATT, B., concurred.

Judgment reversed, with costs.

Feb. 9.

CARR v. JACKSON.

Where a person describes himself in a written instrument as the agent of a person

ASSUMPSIT for freight.—Plea, non-assumpsit; and issue thereon.

At the trial, before *Platt*, B., at the last Newcastle Summer Assizes, a charter party was given in evidence on the



good and approved bill on London, at three months' date. This charter-party being concluded by Mr. C. F. Jackson (the defendant) *on behalf of another party resident abroad, it is agreed that all liability of the former ceases as soon as he has shipped the cargo.* The vessel to be addressed to the charterer's agent at Genoa, paying the usual commission of 3*l.* per cent." The goods were to be delivered to the freighter or his assigns, freight to be paid on delivery. It was contended upon the part of the defendant, that the defendant could not be treated as the principal, and that evidence was inadmissible to contradict the terms of the written instrument. The learned Judge overruled the objection, reserving leave to the defendant to move to enter a nonsuit, if necessary. It was then shewn that, upon the arrival of the vessel at Genoa, a person produced a bill of lading, not signed by the captain of the ship, but which had been delivered by him to the defendant; and that the captain, after taking the advice of the consul there, delivered the goods to the party demanding them. It was further proved, that the defendant had bought and paid for the goods in his own name. The learned Judge asked the jury whether they were of opinion that the defendant was the real owner of the goods; and they having found that he was, a verdict was entered for the plaintiff for the amount claimed.

In Michaelmas Term last

Watson obtained a rule nisi to enter a nonsuit, or for a new trial, on the ground that there was no evidence that the defendant acted as principal in the transaction.

Knowles and *J. Brown* shewed cause.—The defendant is personally liable for the freight, although he has described himself as agent for a principal resident abroad. Unless the defendant shews that he acted merely as agent, he may be treated as the principal. In the notes to *Thompson v.*

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Davenport, 2 Smith's L. C. 222, it is laid down as a deduction to be drawn from the cases, that if a party "state himself to be an agent, but have really no principal, he is in law himself the principal." In *Schmaltz v. Avery* (a), the several cases upon this subject were elaborately treated in the judgment of the Court. It was there held, that the plaintiff might sue for the breach of a charter-party, although he was described in it as *agent* of the freighter. In *Jenkins v. Hutchinson* (b), the Court said, that a party who signs as agent cannot be treated as principal unless it be shewn that he was the real principal. But there, as well as in *Bickerton v. Burrell* (c), *Rayner v. Grote* (d), and *Humble v. Hunter* (e), the supposed principal was named in the instrument of contract. In *Smyth v. Anderson* (f), *Maule, J.*, said, that *Thompson v. Davenport*, "in effect decides that, if the principal is not named, it is the same as if none exists." [Parke, B.—In *Schmaltz v. Avery*, there was evidence that the party who signed as agent of the freighter was, in fact, the freighter, and therefore the principal. Here the difficulty that presses upon my mind is, that, on the face of the instrument, the defendant is represented not to be the owner of the goods; and the question is, whether the simple fact of his having purchased them in his own name is sufficient evidence that he was the true owner? If the defendant was so in fact,

himself as the agent of a third party, and has been treated by the plaintiff as such in the transaction, the burthen of proof rests upon the plaintiff to shew that he is in fact the principal.] There was *primâ facie* evidence which called upon the defendant for an answer; for the bill of lading, although not signed by the defendant, must have been delivered by him to the person who received the goods at Genoa.

Watson, Willes, and Manisty, in support of the rule, were not called upon.

PARKE, B.—I am of opinion that this rule ought to be absolute for a new trial. The defendant would have been responsible for the freight of the goods if it had been shewn that he was the real principal in the matter, and the charter-party which professes to be entered into by him as agent, would not preclude such evidence from being given. The case of *Downman v. Williams*, to which I have referred, is a perfectly good decision, and shews that the *plaintiff* must disprove the statement that the defendant was merely agent, by giving some evidence that he was principal. But in the present case there was no evidence whatever that the defendant, in making the shipment, was the principal. It has been urged that the fact of his the defendant's having purchased the goods in his own name, is some evidence of his being the principal. But that only shews that credit was given to him in that particular transaction, and it is quite consistent with his being the agent of a foreign house for the purpose of shipping the goods. Then the facts which occurred after the shipment do not carry the case any further, for it is quite as consistent that the person who received the goods, upon tendering the bill of lading, was the principal, as the defendant. The defendant therefore appears *primâ facie* to have acted as agent, and the plaintiff has not given any evidence which is inconsistent with that state of circumstances.

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ALDERSON, B.—There was really no evidence that the defendant was principal.

PLATT, B., concurred.

Rule absolute accordingly.

Feb. 13.

ASPLIN v. BLACKMAN (a).

Where the superior Courts have a concurrent jurisdiction with the county courts under the 128th section of the 9 & 10 Vict. c. 95, or in cases where no plaint could have been entered in any county court, or where the cause is removed from the county court by certiorari, the superior Court or a Judge thereof is bound by the 13 & 14 Vict. c. 13, u.

A SUMMONS had been taken out before *Alderson*, B., calling upon the defendant to shew cause why the plaintiff should not recover his costs in the above action.

The motion was made on affidavits, which shewed that the action had been brought in this Court for work done for the defendant. The defendant paid 11*l.* 10*s.* into Court. The plaintiff replied damages ultra. At the trial, a verdict was found for the plaintiff, with 2*l.* 10*s.* damages. The defendant resided within the jurisdiction of one of the Metropolitan County Courts, but the cause of action did not arise either wholly or in any material point within the jurisdiction of the county court within which the defendant dwelt or carried on his business at the time of action brought. At the conclusion of the trial the learned

ment that the Court of Queen's Bench had that morning decided a similar case, in conformity with the decision of the Court of Common Pleas in *Macdougall v. Paterson* (a), and in opposition to that of *Jones v. Harrison* (b) and *Palmer v. Richards* (c) in this Court, the learned Judge adjourned the case to the 13th of February, at Westminster; and on that day the case came on for hearing in the Judge's Room at Westminster, before *Alderson, B., Parke, B.*, being also present.

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Horn, in support of the summons, was stopped by *Alderson, B.*, who stated that he should follow the decision of the Court of Queen's Bench.

Prentice, contrà.—There has been an unnecessary delay here on the part of the plaintiff. He might have applied to the Court in Michaelmas or Hilary Term last. The Court of Common Pleas have laid down a rule, that all applications like the present must be made promptly. *Orchard v. Mooney* (d) is in point.

(a) See the judgment of the Court of Common Pleas in that case, 6 Exch. 337, n.

(b) 6 Exch. 328.

(c) 6 Exch. 335.

(d) In that case a rule nisi was granted on the 13th of January for the taxation of the plaintiff's costs in an action of trespass, to recover damages for an assault and false imprisonment; and on the trial of which in May last, before Lord Campbell, C.J., a verdict was found for the plaintiff, with 40s. damages. It appeared that on the 26th of May the plaintiff applied to *Patteson, J.*, at Chambers, for the costs under the 13 & 14 Vict. c. 61, s. 13; but the summons was dismissed on the authority of *Jones v. Harrison*. The

defendant then paid the amount of the damages without prejudice to the plaintiff's right to apply to the Court for his costs: but upon the Court of Common Pleas disapproving of the decision of *Jones v. Harrison* in *Macdougall v. Paterson*, the present rule had been obtained, against which Sir *F. Thesiger* shewed cause, on the ground that the plaintiff had been guilty of laches in not applying within a reasonable time; *Paterson* appeared in support of the rule. The Court said, that as the plaintiff had not applied within a reasonable time, but had lain by from May to December, when the decision of the Court of Common Pleas was pronounced, the rule must be discharged.

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Horn.—The fact of the plaintiff having been indicted for perjury, together with the delay and expense consequent upon the change of attornies, sufficiently account for the plaintiff's not applying to this Court at an earlier period. Besides the plaintiff could not suppose that the Court of Exchequer would rescind its decision in *Jones v. Harrison*, in deference to the opinion of the Court of Common Pleas. In the case of *Orchard v. Moxey* there was a delay of eight months. [*Alderson, B.*—The decision of the Queen's Bench in *Crake v. Powell* was not given until after Hilary Term, and the plaintiff could hardly be expected to come to the Court of Exchequer and ask them to reverse the decision of *Jones v. Harrison*. I think that, under all the circumstances, the plaintiff has made the application within a reasonable time.] In *Orchard v. Moxey*, *Patteson, J.*, considered a delay of eight months to be unreasonable.

ALDERSON, B., said, that he saw no reason to change his opinion, but thought that he was bound to make the order for costs.

PARKER, B., stated, that he fully concurred in this view.

Order made (a)

1852.

BELLAMY and Another v. MARJORIBANKS and Others.

Feb. 6.

ASSUMPSIT.—The first count of the declaration stated, that the defendants, before and at the respective times of the making of the promises, &c., carried on the business of bankers in co-partnership, under the style and firm of Messrs Coutts & Co., to wit, at Westminster, in the county of Middlesex: And thereupon, heretofore, to wit, on &c., in consideration that the plaintiffs, at the request of the defendants, would retain and employ the defendants in the way of their business, and would deposit money with them as such bankers, to be drawn out by drafts or cheques to be drawn by the plaintiffs upon the defendants under the style aforesaid, the defendants promised the plaintiffs that they, the defendants, so long as they should be so employed by the plaintiffs, would perform their duty as such their bankers as aforesaid. Averments: That the plaintiffs, relying on the promise of the defendants, did, to wit, on &c., and for a long time then next, to wit, until and at and after the breach of duty hereinafter mentioned, retain and employ the defendants as such bankers, and during the time aforesaid, and before the breach of duty aforesaid, to wit, on &c., deposited with the defendants as such bankers, and they the defendants received, and at the respective times of the drawing and presentation as hereinafter mentioned of the draft or cheque in this count after mentioned

The crossing of a cheque payable to bearer with the name of a banker, whether made by the drawer or the bearer, does not restrict the negotiability of the cheque to such banker, or to a banker only; but is a mere memorandum that the holder is to present it for payment through some banker.

Such crossing is made as a protection to the owner of the cheque; and the payment of a crossed cheque otherwise than through a banker, would be strong evidence of negligence, if the party presenting the cheque proved not to be the lawful owner of it.

In an action against a banker for money lent,

to which the defendant pleaded payment, it appeared that the plaintiff had drawn on the defendant a cheque and crossed it thus—"Bank of England, for account of the Accountant-General." A party to whom this cheque was given struck out the crossing by running a pen through it, leaving it however perfectly legible, and crossed the cheque a second time with the name of his own bankers, G. & Co., and paid it into their bank to the credit of his own account. The cheque, being presented by them for payment, was paid by the defendant, who charged it to the debit of the plaintiff's account. The money was placed by G. & Co. to the credit of their principal in his account with them, and he converted the money to his own use. It appeared that the Accountant-General would not receive payment by cheque unless drawn on the Bank of England:—*Held*, that the circumstance of the cheque being thus doubly crossed afforded no additional evidence of negligence against the defendant.

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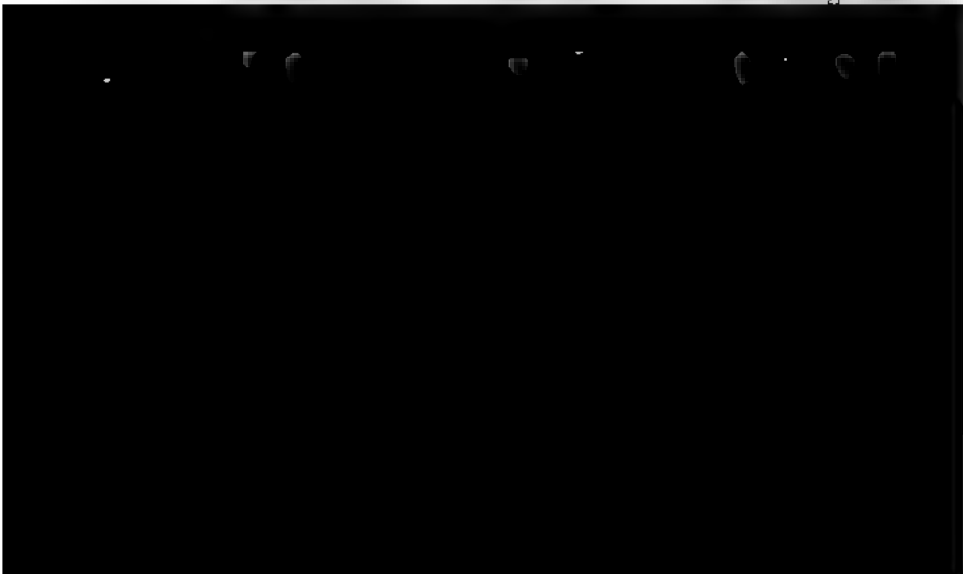
had in their hands as such bankers, monies of the plaintiffs more than sufficient to pay the draft or cheque in this count after mentioned, and amounting in the whole to a large sum of money, to wit, 5000*l.*; and afterwards, and whilst the defendants were so employed by the plaintiffs as such bankers, and whilst the defendants, as such bankers so employed, had in their hands such sums of money, the plaintiffs drew, and signed and subscribed with their names, a certain draft or cheque on the defendants as such bankers, under the style aforesaid, commonly called a cheque on a banker, to wit, in the words and figures following:—

London, June 23rd, 1845.

Messrs Coutts and Co.—Pay to Edward Bryant Geary, or Bearer, Two Thousand Five Hundred and Ninety-six Pounds, Seventeen Shillings.

£2596:17:0 THOS. E. BELLAMY, CHAS. J. FOSTER.

That afterwards, and before the delivery of the said draft or cheque to Edward Bryant Geary therein mentioned, the plaintiffs crossed the draft or cheque in a certain manner, according to the custom and usage of bankers in that behalf; and thereby, according to the said custom and usage, directed the amount of the draft or cheque to be paid by the defendants as such bankers into and through the



tion so carrying on the business of bankers, to wit, the said Governor and Company of the Bank of England: Nevertheless, the said defendants, in breach of their said duty as such bankers, afterwards, and whilst they were so employed by the plaintiffs as such bankers as aforesaid, to wit, on &c., wrongfully and improperly paid the amount of the draft or cheque, to wit, the said sum of money therein mentioned, otherwise than into and through the hands of the said corporation, to wit, by their paying the amount of the said draft or cheque into the hands of certain persons carrying on business under the style of Messrs Gosling & Co., then being the agents of the said Edward Bryant Geary in that behalf; by means of which said premises the said Edward Bryant Geary was enabled fraudulently to misapply and convert to his own purposes, and did then in fact fraudulently mis-apply and convert to his own purposes, the sum of money in the said draft or cheque mentioned; and the Governor and Company of the Bank of England were prevented from receiving the amount of the draft or cheque, and applying the same, to wit, on behalf and on account of the plaintiffs, to the purpose referred to in and by the said crossing of the draft or cheque, as they otherwise would have done, and the amount of the said draft or cheque, by means of the premises, became and was and is wholly lost to the plaintiffs.

The declaration also contained a count for money lent.

The defendants pleaded (*inter alia*) to the first count, that there was no such custom or usage of bankers as therein alleged; and to the second count, payment.—Issues thereon.

At the trial, before *Martin*, B., at the Middlesex Sittings after Trinity Term, 1851, it appeared that the action was brought to recover the sum of 2596*l.* 17*s.*, under the following circumstances.—The plaintiffs were trustees of a gentleman named Frank, who died a lunatic, and they had opened an account with the defendants, Messrs. Coutts & Co., for the purposes of the trust. A suit was pending in the Court of

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Chancery with reference to the trust, in which a Mr. Triston acted as the solicitor for the plaintiffs. The other parties to the suit were the next of kin of Mr. Frank, and a Mr. Geary acted as solicitor for them. In June, 1845, Mr. Geary brought to Mr. Triston a cheque upon Messrs. Coutts, written out by him for 2596*l*. 17*s.*, to be signed by the plaintiffs. It was, when delivered to Mr. Triston, in the common form. Mr. Triston sent the cheque to the plaintiff Mr. Bellamy, at Brighton, who returned it signed, with the following addition in his own handwriting, namely, at the end of the body of the cheque, the words: "General Unpaid Costs Account," and crossed as follows: "Bank of England, for account of Accountant-General." Mr. Triston then sent it to the other trustee (the plaintiff Mr. Foster) to be signed by him, and, having received it back, delivered it to Geary. In point of fact, the department of the Bank of England, in which the business of the Accountant-General is conducted, would not have received this cheque, it being the rule not to receive any, except one drawn on the Bank of England itself, and this rule is well known among the London bankers. Upon the day on which Geary received the cheque, he struck out the crossing made by Mr. Bellamy, by running a pen through it, leaving it however perfectly legible, and crossed the cheque a second time with the name of Messrs. Gosling

clerk of Messrs. Gosling presented it for payment at Messrs. Coutts & Co., who paid it, and charged it to the debit of the plaintiffs' account. The money was placed by Messrs. Gosling to the credit of Geary in his account with them. He never paid the money to the Accountant-General, and the plaintiffs were obliged to make it good.

The plaintiffs' counsel relied, first, upon the custom or usage stated in the first count, in respect of which a number of witnesses were examined on both sides; secondly, they submitted that, even if the custom was not proved, the defendants were guilty of negligence in paying the cheque so crossed, and therefore they could not avail themselves of the payment in support of the plea to the second count. The learned Judge put the question in writing to the jury, whether there was a custom and usage, and consequent duty on the defendants, not to pay the cheque otherwise than into and through the hands of the Bank of England; and also whether the defendants were guilty of negligence in paying the cheque to Messrs. Gosling. The jury answered both questions in the affirmative, and a verdict was entered for the plaintiffs for the amount claimed.

Sir *F. Thesiger*, in the following Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection, and also that the verdict was against the weight of evidence.

The *Attorney-General*, *Knowles*, and *Unthank* shewed cause in the following Hilary Term (January 17).—The plaintiffs are entitled to retain the verdict on both counts. The usage alleged in the first count, and which the plaintiffs were bound to prove, has been established, since the jury have found that it was the duty of the defendants not to pay the cheque except to the Bank of England. And with regard to the second count, it was incumbent on the defendants to prove that the payment was duly and properly made; and the jury have found that the defendants

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paid the cheque without exercising due care and caution. If this had been the case of a bill of exchange instead of a cheque, there could have been no question; for *Sigourney v. Lloyd* (a) expressly decided that an indorsement, thus, "Pay to A. or his order for my use," is a restrictive indorsement, and the indorsee of A. is a mere trustee, and must hold the proceeds for the use of the restricting indorser. In like manner, it is competent for a person, who directs his agent to pay money on his account, to order that the payment shall be made only in a particular way. [*Martin, B.*—If the defendants had refused to pay this cheque, what was to prevent Geary from suing the plaintiffs?] The fact of the defendants being bankers does not render them the less agents of the plaintiffs, or excuse their non-compliance with the directions as to the mode of payment. The crossing on the cheque clearly indicated the plaintiffs' intention that the amount should not be paid to Geary, but to the Bank of England, for the account of the Accountant-General. Suppose, instead of crossing the cheque, the plaintiffs had written a letter to the defendants, informing them that Geary had received the cheque on account of the Accountant-General, and requiring them to pay it to the Bank of England, would they have been justified in disregarding those instructions? [*Pollock, C. B.*—They could not comply with them, for there was

whose name was on that indorsement would not receive payment by cheque, so that there was a reason for striking it out?] The first indorsement, being in the handwriting of one of the plaintiffs, was distinct notice to the defendants that the payment was not to be made to Geary. No person had any right to alter that indorsement except the Bank of England. There is a difference between an indorsement by the drawer of a cheque and an indorsement by the bearer. A banker owes a duty to his customer, but none to the holder of a cheque; and therefore, when the latter has indorsed a cheque and passed it away to another person, that person may strike out such indorsement and insert his own; but an indorsement by the drawer is an express direction by the customer to the banker to pay to the party named therein, and no other. [*Martin, B.*—None of the witnesses at the trial mentioned any such distinction.] If the first crossing had any meaning, it was that the amount of the cheque should be paid through the Bank of England to the account of the Accountant-General. Assuming that a cheque so crossed would not be within the exemption of the Stamp Act, 55 Geo. 3, c. 184, Sch. 1, that is no excuse for the banker paying it otherwise than according to his customer's directions, but only a reason for refusing payment altogether. If it be said that the payment was justified by usage, then the defendants were bound to prove a custom for bankers to disregard the directions of their customers in this respect; and, having failed to do so, it is unnecessary to argue that such a custom could not be valid.

Channell, Serjt., and Sir J. Bayley in support of the rule.—There can be no negligence on the part of the defendants, if they were justified in point of law in paying the cheque; and even if not, the evidence rebuts any supposition of negligence. It is submitted, however, that they were so justified. The cheque is an order to pay “Geary

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or bearer," and the defendants have paid Geary's banker, which is strictly according to the usage in respect of crossed cheques, and equivalent to a payment to Geary himself. There was nothing to exclude the presumption that the payee was the bearer of the cheque. Then is the case altered by the crossings? The words "Bank of England, for account of Accountant-General," do not restrict the negotiability of the instrument. Of themselves, those words have no legal effect whatever; their operation is purely conventional. The custom attempted to be established is, irrespective of the Stamp Act, invalid, for its effect is to contradict the plain meaning of a written order. A custom may be applied to explain a written instrument, or it may be annexed, so as to give the subject-matter of it an operation upon which the instrument is silent; but it cannot be used for the purpose of contradicting the instrument. Here it contradicts both the right to pay Geary and the right to pay the bearer, and prevents the negotiability of the cheque. *Sigourney v. Lloyd (a)*, which was the case of a bill of exchange, is no authority for the plaintiffs' proposition. A bill of exchange, payable to the order of the drawer, and indorsed in blank, becomes a negotiable instrument; and, notwithstanding the holder may indorse it specially, he cannot restrain its negotiability as regards the prior parties, though as against him-

through that indorsement: it is so laid down by *Holt*, C. J., in *Clerk v. Pigot* (a), and in Bayley on Bills, p. 136, 6th ed.] Further, if this crossing has the effect contended for by the other side, the instrument is not within the exemption of the Stamp Act, 55 Geo. 3, c. 184, Sch. pt. 1, tit. "Bill." Whether the alleged custom restricts the payment to the banker mentioned by the customer, or merely renders it necessary that some banker should present the cheque for payment, it is equally a violation of the Stamp Law, since the cheque is no longer payable to bearer. [They then argued that the evidence did not support the finding of the jury.]

Cur. adv. vult.

On a subsequent day (January 24) the Court intimated that they had come to the conclusion that a new trial ought to be granted on payment of costs, on the ground that the verdict was against the weight of evidence, but that the importance of the case required a deliberate judgment.

The judgment of the Court, consisting of *Pollock*, C. B., *Parke*, B., *Alderson* B., and *Martin*, B., was now delivered by

PARKE, B.—We have already intimated that in this case there ought to be a new trial, on the ground that the evidence given on the trial was not satisfactory to support the verdict; and if it were an ordinary case of setting aside a verdict upon such a ground, we should probably have confined ourselves to merely expressing our opinion to this effect. But there is involved in the present controversy a most important question with respect to cheques on bankers, and it seems to us that it is right to state with some particularity the nature of the question to which the attention of the jury must be on the new trial directed.

(a) 12 Mod. 193.

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Payment by cheques has now almost entirely superseded all other modes of payment in large, and is in very general use in smaller, money transactions; and the practice of crossing them with the names of bankers (the effect of which is the question in the present case) is also in very general use, and occurs in very many instances every day, not only in London, but in several other parts of the kingdom. It therefore seems to us to be of great importance that the effect of this crossing should be rightly understood.

The facts of the case were these:—[His Lordship stated the facts as above set forth, and proceeded—] Under these circumstances the plaintiffs brought the present action against the defendants, alleging that the latter were bound to make good to them the amount of the cheque so paid by them to the clerk of Gosling & Co.

The first count of the declaration was a special one; and it averred a duty consequent upon an alleged custom and usage of bankers, to the effect that the defendants were not to pay the cheque otherwise than unto and through the hands of the Bank of England, and alleged as a breach the payment of the cheque to Messrs. Gosling. There was a plea denying such a duty. There was also a count for money lent, to which there was a plea of payment. And upon the issues arising upon these two pleas

the alleged custom, and incidentally as to the alleged negligence; and ultimately the jury expressed their opinion that the defendants were guilty of negligence in paying the cheque to Messrs. Gosling, and in answer to a written question stated, that there was a custom and usage, and consequent duty upon the defendants, not to pay the cheque otherwise than into and through the hands of the Bank of England.

A new trial was moved for, on the grounds of misdirection, and of the verdict being against the weight of evidence: and the whole question, both as to the law applicable to the case and as to the facts, has been lately argued before us with great ability.

The objection as to the misdirection was abandoned by the learned counsel for the defendants; but it was insisted that the verdict upon the first count, and on the plea of payment to the second count, was against the evidence: and we are of that opinion. The plaintiffs first contended that the crossing of the cheque to the Bank of England in the manner in which it was crossed, absolutely restricted the negotiability of the instrument, and rendered it payable to the Bank of England alone, and to the account mentioned, viz. the Accountant-General's, and to no other person, and that a binding custom or usage to this effect was proved. We are of opinion that no such custom or usage was proved. Without going the length of saying that there was no evidence to go to the jury as to the existence of such a custom, we think that the weight of the evidence was against it.

A custom such as that alleged in the first count would be binding and obligatory upon all persons engaged in a certain trade, because long and universally acted upon by all persons in such trade, who may therefore reasonably be presumed to have made their contracts upon the faith of it. The custom alleged could only be proved by a

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long, well-known, acknowledged, and universal usage and practice amongst bankers to act in accordance with it: whilst, so far from this being the case, many witnesses from the different London banking houses called by the plaintiffs, and all those called by the defendants, denied its existence. That there was any special usage between the plaintiffs and Messrs. Coutts was never once suggested. The banking business in London is not in very many hands, and all the witnesses on both sides were persons of unimpeachable integrity and veracity; and it seems to us quite absurd to suppose that there could be any custom creating such a duty as that alleged in the first count, being absolutely binding by reason of long and universal usage upon all the bankers in the metropolis, without those gentlemen being well acquainted with it. The verdict was therefore upon this point unsupported by the evidence.

We are also of opinion that such a custom, if proved to have existed in fact, would be incapable of being supported in point of law. The crossing a cheque cannot operate as an indorsement to the banker whose name is used, because it was not written with any intent to transfer the property in the cheque to him, and it wants the essential part of an indorsement, the delivery of the instrument to the indorsee. And we think it cannot well be supposed that the usage is

banker alone. To hold it to have this effect would be to render the instrument no longer a cheque. The case of *Sigourney v. Lloyd* (a) was cited on both sides, but it really has no application. The point decided there was one concerning a restricted indorsement of a bill transferable by indorsement only. We think, therefore, the plaintiffs cannot succeed upon the first count.

The learned counsel for the plaintiffs however, both at the trial and on the argument, relied with greater confidence upon the count for money lent; and they insisted that the payment to Messrs. Gosling's clerk of the cheque doubly crossed in the manner it was, was an unauthorised and negligent act, and that the defendants had no right to credit themselves with this payment: and if this contention were well founded, the defendants would certainly be without defence, as the only answer to this count was the plea of payment.

It was also alleged that the addition to the crossing to the Bank of England, that it was "for account of Accountant-General," imposed a greater degree of responsibility upon the defendants. None of the witnesses however appeared to attach much importance to this circumstance as against the defendants, and many of them considered that it made in their favour, inasmuch as it was well known that the Bank of England would not receive for the Accountant-General a cheque so crossed:—the evidence on both sides was mainly directed to the circumstance of the double crossing. On behalf of the plaintiffs it was said, that the original crossing by Mr. Bellamy to the Bank of England ought to have prevented the defendants from paying the cheque to Messrs. Gosling, or at all events ought to have made the payment one at their peril in the event of Geary misapplying the money. On behalf of the defendants it was said, that the payment was strictly

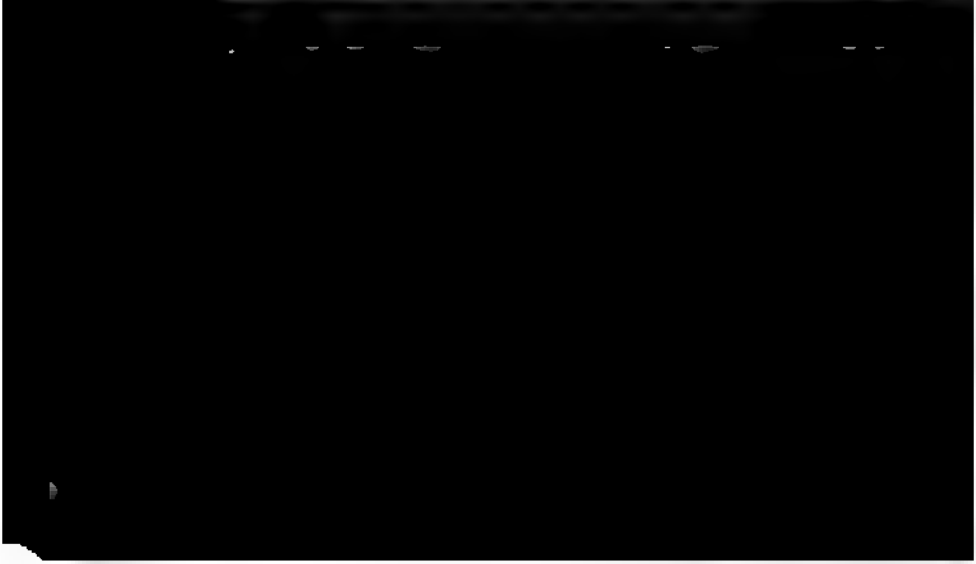
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(a) 8 B. & C. 622; in error, 3 Y. & J. 220.

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according to the custom and usage of bankers in respect of crossed cheques, and that the payment was a payment to Geary, the payee of the cheque.

As the effect of the crossing a cheque is not, in our opinion, to restrain the negotiability of the cheque, it will be fit to consider what its effect probably is, that the attention of the jury may be directed to this question on the new trial. It was agreed on all hands, that the practice of crossing cheques originated at the clearing-house; the clerks of the different bankers who did business there having been accustomed to write across the cheques the names of their employers, so as to enable the clearing-house clerks to make up the accounts. It is quite clear that this had nothing whatever to do with the restriction of negotiability; for, at the time when this was done, the cheques were in the course of payment or presentation for payment, and all their negotiability was at an end. The establishment of the clearing house is comparatively modern (a), and was within the memory of several of the witnesses. It afterwards became a common practice to cross cheques, which were not intended to go through the clearing-house at all, with the name of a banker, or with the words "& Co.;" and a custom or usage has certainly sprung up in regard to this also. All the witnesses agreed as to the fact of the existence of such a custom, and we

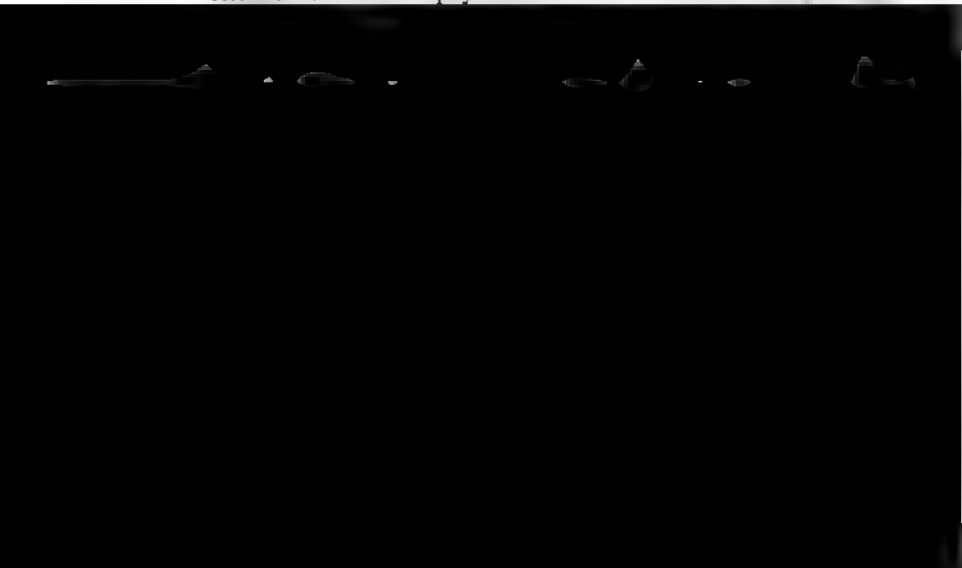


ing entitled to receive it. That the object is to secure the payment not to any particular banker, but to *a banker*, in order that it may be easily traced for whose use the money was received; and that it was not intended thereby to at all restrict the circulation or negotiability of the cheque, but merely to compel the holder to present it through a quarter of known respectability and credit." We are strongly inclined to think that, on a full inquiry, the usage will turn out to be no more than this; and, considering the custom in this point of view, the crossing is a mere memorandum on the face of the cheque, and forms no part of the instrument itself, and in no way alters its effect. There can be no doubt that such an usage is highly beneficial to the public. These instruments are in their essential character payable to bearer, they are in many respects treated as bank notes, for which of late years they have been largely substituted; but like all other things they are liable to be mislaid, or lost, or stolen, and may get into the hands of persons who are not entitled to receive payment of them. It is manifestly, therefore, a great protection and safeguard to the real owner, that there should exist the means of tracing and ascertaining for whose use the money paid on a cheque is received, and to whom the money actually goes; and the payment through a banker secures this object. Bankers are in general persons of great respectability, and, we believe it may be truly said universally, are incapable of lending themselves to any concealment or suppression of the truth, in order to promote or assist fraud. We think, therefore, that it is a matter of great public advantage and benefit, that the custom or usage, which we have already mentioned as being said to exist in point of fact, should be maintained; and we think it well may, without at all improperly trenching upon or restricting the negotiability of cheques. We think the crossing of a cheque is a protection and safeguard *to the owner of the cheque*, and that, in the event of a banker

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paying a crossed cheque otherwise than through a banker, the circumstance of his so paying would be strong evidence of negligence in an action against him. For instance, let us suppose the customer of a banker to draw and to cross a cheque, intending to pay it to a person to whom he was indebted, and that afterwards and before handing it over to his creditor he either lost it, or it was stolen from him. If this cheque was presented otherwise than through a banker, then, according to the custom or usage above mentioned, it would not be paid, but if presented by a banker it would. The mere circumstance of the necessity of placing the cheque in the hands of a banker would, of itself, oppose some impediment to a fraudulent holder in dealing with the cheque, and making it available; and the fact that it could at once be traced and ascertained for whose use the proceeds were received, would give considerable aid in enabling the drawer to recover back the money, in the event of his being entitled so to do. On the other hand, if the banker disregarded the custom and paid the cheque to a private individual, that circumstance would be strong evidence against him in the event of his seeking to charge his customer with the payment, if the person actually presenting it was not the lawful holder and bearer of the cheque. The lawful owner of a cheque is of necessity entitled to receive payment of it. He could not sue the



negotiability by delivery. There is no obligation upon any one to receive payment by a cheque, whether it be crossed or not crossed; but if a man receive a crossed cheque, he seems to us not indeed to incur the obligation of presenting it for payment through a banker as a condition precedent, but he ought not to complain if the drawee does not pay without previous inquiry. There is really no restriction upon its negotiability, but it is, in our opinion, a reasonable and lawful practice and usage, in order to secure, as far as possible, payment of cheques to honest and bonâ fide holders.

It was contended by the learned counsel for the plaintiffs, on the argument before us, that on the plea of payment the onus was on the defendants to shew that the payment was duly and properly made; and in that we agree. But we think it highly probable that the custom or usage before mentioned was that which was established by the preponderance of the evidence at the trial, and in such a case the circumstance of the cheque in question being doubly crossed appears to be immaterial. The custom would authorise the payment to any banker, and the payment to Messrs. Gosling would not be the less regular because the cheque was a second time crossed in their names. We are therefore of opinion that the verdict as to the question of negligence was also against the weight of evidence, and that the defendants are entitled to a new trial.

Another point was urged by Mr. *Unthank* for the plaintiffs, that the crossing in this case was not by the holder, but by the drawer himself, who had power to give any directions he pleased to the bankers, and that it was equivalent to the addition to the cheque, which was originally payable to bearer, of an express direction that it should not be paid to the bearer, but to the Bank of England only. He admitted that in such a supposed case the defendants were not bound to pay to the Bank of England, because the alteration would bring the cheque within the

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operation of the stamp laws; but he contended, that if the defendants chose to pay it they could not do so to any one else, and if they did they would disobey the order of their customer, and could not charge the amount to his debit in account. And this reasoning would be correct, if the crossing, when made by the drawer, by the custom amounted to a direction to pay the named banker only, and for the named account. If such were its conventional meaning, it would be necessary for the bankers, not merely to look at the signature of the cheque, but also to the handwriting of the crossing. But the crossing itself does not import that payment is to be made to the Bank of England *only*. It is a matter of evidence what its meaning is by the usage. On the trial, the evidence has not made any distinction between the meaning of the words when written by the customer of the banker and by a third person, and we have before intimated our opinion that, according to the weight of evidence, they have not the restrictive meaning attributed to them by the plaintiffs' counsel. It seems to us to be probable, that the more correct view of the practice of crossing cheques is for the protection of the owner of the cheque: and we feel strongly that, to carry it farther, and make the banker answerable to his customer for the appropriation by the payee of the proceeds of a crossed cheque

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KNIGHT v. EGERTON and Others.

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CASE.—The declaration contained six counts: first, for distraining the plaintiff's goods for an alleged arrear of rent due to the defendants (who were the plaintiff's landlords of a farm in the county of Chester), a less amount of rent being in fact due; secondly, for an excessive distress; thirdly, for selling the goods distrained without having duly appraised the same; fourthly, for distraining beasts of the plough, there being, without them, a sufficient distress to satisfy the rent and expenses; fifthly, for not paying over to the plaintiff the overplus, after satisfaction of the rent and the lawful expenses of the distress and sale; and, lastly, for selling for less than the best prices that might have been obtained.

The defendants pleaded to the first, fifth, and last counts, not guilty; to the second and fourth, a plea of payment into Court of £1; and to the third, a plea of payment into Court of 10s. To the latter pleas there were replications of damages ultra; on which issue was joined.

At the trial, before *Wightman*, J., at the last Summer Assizes for Cheshire, it appeared that the rent in arrear was 144*l.*; that all the household goods and farming stock of the plaintiff, including his beasts of the plough, were distrained, the value of the former being sufficient to satisfy the rent and expenses, without the beasts of the plough; that the goods were appraised before the constable of the *township*, and, as was alleged on the part of the plaintiff, but not proved, that one of the sworn appraisers was one of the bailiffs who made the distress; and that the rent and expenses, amounting in all to 161*l.*, were satisfied without selling the beasts of the plough, of which the plaintiff had retained the undisturbed possession and use. It appearing that amongst the expenses of the distress there was a charge

In case for selling goods distrained for rent without appraisement, the measure of damages is the real value of the goods sold, ~~minus~~ the rent due.

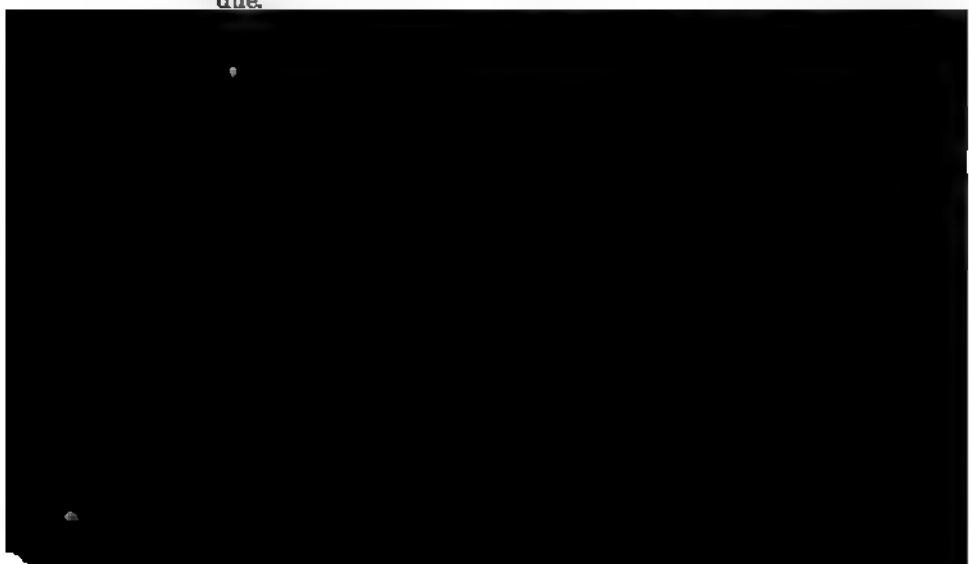
If a Judge at *Nisi Prius* does not inform the jury what is the proper measure of damages on an issue on which it is admitted that the plaintiff is entitled to a verdict and to damages, the Court will direct a new trial, although the point was not taken by the plaintiff's counsel at the trial.

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of 2*l.* 2*s.* which could not lawfully be made, the plaintiff had a verdict for that amount on the issue on the fifth count. As to the other counts (the first having been abandoned), the learned Judge left it to the jury to say, first, whether the sale had been improperly conducted, so that the best prices had not been obtained for the goods; and secondly, whether the sums paid into Court were a sufficient compensation for any loss or inconvenience which was proved to have been sustained by the plaintiff, by the admitted irregularities in respect of which they were so paid in; and the jury found on all these issues for the defendants.

In the following Michaelmas Term,

Herbert Jones, Serjt., moved for a rule nisi for a new trial, on affidavits, and also on the ground of misdirection as to the issue on the third count; and *Parke*, B., referring to the case of *Biggins v. Goode* (*a*), observed, that the proper measure of damages on that count was the value of the goods, *minus* the rent; that the *distress* being lawful, but the *sale* without a due appraisement not so, the plaintiff retained, notwithstanding the sale, the same interest in the goods which he had while they were in the landlords' hands, before the sale, i. e. to the amount of the real value of the goods, subject to the landlords' right for the rent due.



per measure of damages was as laid down in *Biggins v. Goode*, and other cases (a). But

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THE COURT (b) said, that the plea of payment into court was a conclusive admission that there was a sale without the goods having been duly appraised; and that it was the duty of the Judge to inform the jury what was the true measure of damages on that issue, whether the point was taken or not; so that the rule must be absolute for a new trial, unless the defendants' counsel agreed to increase the damages to the proper amount.

Rule absolute.

Herbert Jones, Serjt., and *Mills* appeared in support of the rule.

(a) See *Knotts v. Curtis*, 5 Car. & P. 322; 2 Tyr. 449, n.; *Whitworth v. Maden*, 2 Car. & K. 517. (b) *Parke*, B., *Alderson*, B., and *Martin*, B.

FINLAY v. THE BRISTOL AND EXETER RAILWAY COMPANY.

ASSUMPSIT for use and occupation. Plea, non-assumpsit; and issue thereon.

At the trial, before *Platt*, B., at the Middlesex Sittings in last Michaelmas Term, it appeared that the action was brought to recover three quarters of a year's rent for certain rooms and offices of the plaintiff in Duke-street, Westminster, from the 16th of March to the 16th of December, 1849, under the following circumstances:—In the year 1846, the solicitors of the defendants, an incorporated Company, were in the occupation of certain rooms on the ground floor of the plaintiff's house; but finding that the

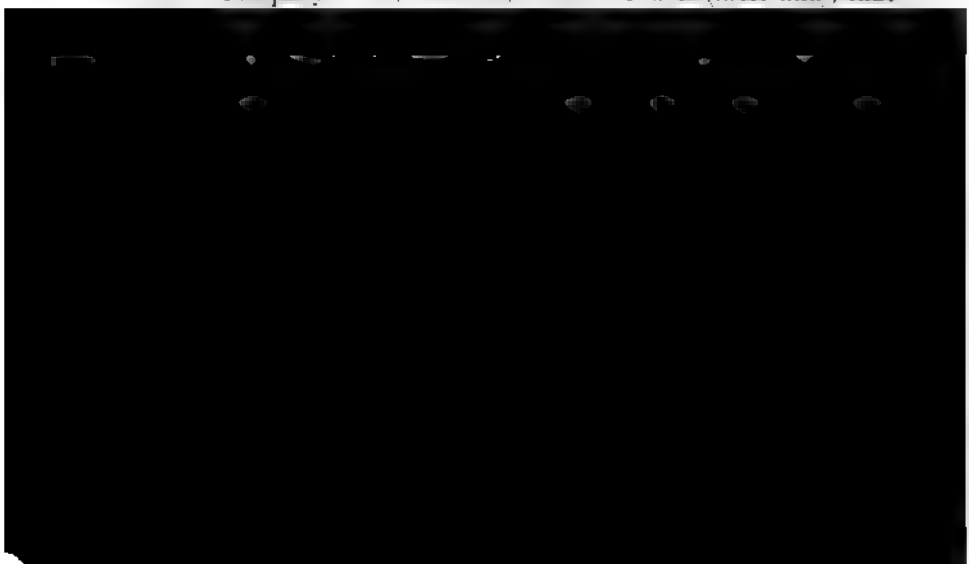
An incorporated Railway Company agreed by parol to take certain premises for a year. They occupied, and at the end of the year continued to occupy for another year, at the expiration of which period they removed their goods, without any previous notice to quit,

but paid rent up to the end of the following quarter:—*Held*, that they were not liable in an action for use and occupation for the remaining three quarters of a year, since they did not occupy during that period; and that no tenancy could be inferred from the payment of rent, inasmuch as they could not contract except under seal.

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rooms were insufficient for the purposes of carrying on the business of the Company, they entered into negotiations with the plaintiff on the subject of taking the rooms on the second floor also; and accordingly, on the 5th of December, 1846, one of the firm wrote the following letter to the plaintiff on the subject:—"I am authorised by the directors of the Bristol and Exeter Railway Company to take the floor above that we rent of you at the price and for the time named by you: namely, 100*l.*; time, one year from the 16th instant; and you will therefore please to consider the rooms our's accordingly." The plaintiff having acceded to this proposal, the directors of the Company furnished the rooms, and occupied them from that time to the 16th of December, 1848, when they removed all their furniture and effects, and left the keys in the doors. They paid the rent up to the 16th of March, 1849.

On the part of the plaintiffs it was contended, that the defendants were tenants from year to year; and that, as they had not given any notice to quit, they were liable for the rent sought to be recovered in this action. On the part of the defendants it was contended, that, as they had not occupied the premises during the time in question, they were not liable in *assumpsit*: *Diggle v. London and Blackwall Railway Company(a)*. The 145th section of the Company's Act, 6 Will. 4, c xxxvi. enacts (*inter alia*), that



In Michaelmas Term last, *Kinglake*, Serjt., obtained a rule nisi accordingly.

In the present Sittings (*a*)

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Warren and *Milward* shewed cause.—As a general rule, a corporation cannot bind itself, except either by deed or by such a contract as is made in compliance with the requisites of some statute, by which contracts entered into with the corporation are binding upon it. To this rule, however, there are exceptions. First, a corporation may be bound by a contract, the subject-matter of which is of frequent occurrence, and is of an insignificant character. The occupation of rooms by a Company is of that description. [*Alderson*, B.—To bring the case within that exception, it must be shewn that the dispensing with the seal of the corporation is a matter of convenience, amounting almost to necessity. That principle was expounded in *Church v. Imperial Gas Light Company* (*b*), and was acted upon in *Mayor of Ludlow v. Charlton* (*c*), *Lamprell v. Guardians of the Billericay Union* (*d*), and *Diggles v. The London and Blackwall Railway Company* (*e*). It cannot be contended that the occupation of premises for a year is either a matter of daily occurrence, or of so trivial a character as to require the dispensation with the corporate seal.] The case of *The Dean and Chapter of Rochester v. Pierce* (*f*) shews that there is a distinction between actions for use and occupation and in respect of other contracts. Lord *Ellenborough* there says, “A corporation cannot demise except by deed; but the action for use and occupation does not necessarily suppose any demise: it is enough that the defendant used and occupied the premises by the permission of the plaintiff; and a corporation, as well as an individual, may without deed permit a person

(*a*) Feb. 11 & 12.
 (*b*) 6 A. & E. 846.
 (*c*) 6 M. & W. 815.

(*d*) 3 Exch. 283.
 (*e*) 5 Exch. 442.
 (*f*) 1 Camp. 466.

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to use and occupy premises of which they are seised." That ruling was upheld by the Court in Banc. The principle is thus explained by *Best*, C. J., in *The Mayor of Stafford v. Till* (a):—"Where a party has occupied land, the contract between him and the landlord must be considered as executed; so that there is no necessity for alleging in the declaration any express promise to pay—from the fact of the occupation a promise to pay will be implied; although in an executory contract the plaintiff must rest his case upon an express promise; and where that is so, if one of the parties is not in a condition to enter into a promise, he cannot take advantage of a promise by the other, because there would be no mutuality in the contract." *The Barber Surgeons of London v. Pelson* (b) decided that a corporation aggregate may maintain assumpsit for money forfeited under a bye-law. Again, in *The Mayor and Burgesses of Carmarthen v. Lewis* (c), *Parke*, B., ruled that a corporation aggregate might maintain an action for tolls without an agreement under seal. [*Parke*, B.—It is difficult to see how these defendants can be made responsible, for they have not occupied during the time for which the rent is sought to be recovered. They could not become tenants from year to year except by contract; and they are incapable of contracting unless under seal, or in the mode prescribed by the statute. The authori-

thing intended to be given; the form of action marked out, (being enlarged by a necessary construction so as to be allowed to be maintained without an express promise,) is the proper form in which such reasonable satisfaction is to be recovered; but the reasonable satisfaction, which in its own nature must apply to something specific by which it can be estimated, being here given for use and occupation and for nothing else, it is a remedy which, in its nature, is not co-extensive with a contract for rent; nor does it seem to have been within the scope and purview of the Act to make this remedy co-extensive with all the remedies for the recovery of rents claimed to be due, by the mere force of the contract for rent." [Parke, B.—No doubt, if the defendants had occupied by permission of the plaintiff they would have been bound to pay, but they have not occupied. Then, the question is, whether there is any holding; and in order to establish that, the plaintiff must prove a contract valid in law. *Predyman v. Wodry* (a) is an authority that a lease for years cannot be made to a corporation without deed.] *Beverley v. The Lincoln Gas Light and Coke Company* (b) decided that a corporation aggregate may be sued in assumpsit on an executed parol contract. There *Patteson, J.*, in delivering the judgment of the Court, after referring to the cases of *The Dean and Chapter of Rochester v. Pierce* (c), and *The Mayor of Stafford v. Till* (d), as establishing that, where a benefit has been enjoyed, such as the occupation of the lands of the corporation by their permission, the law will imply a promise to make them compensation, says, "The action for use and occupation is established by the stat. 11 Geo. 2, c. 19, s. 14, and, according to the words of the statute, may be maintained 'where the agreement is not by deed.' Some agreement seems to be implied as the foundation; though it is well established that it need not amount to a

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(a) Cro. Jac. 110.

(b) 6 A. & E. 829.

(c) 1 Camp. 466.

(d) 4 Bing. 75.

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formal demise, or even be express. To hold, then, that a corporation is within this statute, is to hold that it may be a party to an agreement not under seal, at least for the purpose of suing on it, and it would be rather strong to deny, at the same time, that it could be a party to it for the purpose of being sued on it." *De Grave v. The Mayor and Corporation of Monmouth* (a) is also there cited as an authority, that a corporation may contract for the purchase of goods without deed. [*Martin, B.*—The doctrine laid down in *Beverley v. The Lincoln Gas Light and Coke Company* is commented on and explained in *The Mayor of Ludlow v. Charlton* (b).] The object of the 11 Geo. 2, c. 19, s. 14, was to afford a remedy to landlords for the occupation of their premises, without reference to any contract in fact between them and the occupiers: *Standen v. Christmas* (c), *Mayor of Newport v. Saunders* (d), *Lumley v. Hodgson* (e).

Secondly.—Assuming that an action for use and occupation may be maintained against a corporation on an executed parol contract, the defendants in this case are liable, for they paid rent up to the 16th of March, 1849, and quitted the premises without giving any previous notice. It is *prima facie* sufficient for the plaintiff to shew an occupation by the defendants, and then the onus is cast on them to prove that the tenancy was determined.

of rent is only a circumstance from which a contract may be implied.] It may be conceded that a corporation is not liable on a parol executory contract for work and labour, or goods sold; but it is otherwise where the contract is executed: *The Fishmongers' Company v. Robertson* (a), *Sanders v. The Guardians of St. Neots Union* (b). Corporations have been held liable in trover and trespass for the acts of their servants, though unauthorised by seal: *Yarborough v. The Bank of England* (c), *The Eastern Counties Railway Company v. Broom* (d), *Maud v. The Monmouthshire Canal Company* (e); and even to an indictment: *Rex v. Regent's Canal Company*, cited in *Regina v. The Birmingham and Gloucester Railway Company* (f). If a lease be made to an individual, and he takes possession of the premises under it, he is bound by the terms of the lease, although he has not executed it. It is the same with a corporation who occupies. [*Parke*, B.—The difficulty is to see when the tenancy was created.] Upon the payment of the first quarter's rent. [*Martin*, B.—Payment of rent does not of itself create a tenancy from year to year, but is only evidence from which a jury may find the fact: *Jones v. Shears* (g).]—They also referred to *Paine v. The Guardians of the Strand Union* (h), and the Company's Private Act, 6 Will. 4, c. xxxvi. s. 238.

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Kinglake, Serjt., and *Rowe* appeared to support the rule, but were not called upon.

PABKE, B.—The rule must be absolute. The defendants, a corporation aggregate, originally agreed by parol to take the premises in question for a year. Whether or no

(a) 5 M. & G. 131.

(b) 8 Q. B. 810.

(c) 16 East, 6.

(d) 6 Exch. 314.

(e) 4 M. & G. 452.

(f) 2 Q. B. 47.

(g) 4 A. & E. 832.

(h) 8 Q. B. 326.

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that agreement was binding, it is not necessary to determine; for, having occupied, they became liable, according to the authorities, to pay rent for the period they occupied; and in respect of that an action for use and occupation would lie. At the end of the year they continued to occupy for another year; and that period having expired, they removed their goods without any previous notice, but in the course of the following year paid a quarter's rent. The plaintiff now seeks to recover for the remaining three quarters of the year during which the defendants did not occupy. In order to render them liable, it is sought to make out a constructive occupation; but that can only arise from contract, and the defendants cannot contract unless under seal, or in the statutory mode. The difficulty I entertained from the first is, that the defendants did not occupy, and consequently this case is not within the authorities which decide that a Company may be liable on a contract, though not under seal. The expressions of my Brother *Patteson*, in delivering the judgment of the Court in *Beverley v. The Lincoln Gas Light and Coke Company*, would certainly seem to imply that a corporation could, under such circumstances as these, enter into a parol agreement for a yearly tenancy; but although that judgment may be supported on other grounds, there are several recent cases in which the power of corporations to bind

v. *The Lincoln Gas Light and Coke Company* may be supported on that ground, for their parliamentary charter evidently contemplated that they might purchase articles necessary for a gas company without contract under seal. The other cases are the ancient common-law exceptions, which are simply confined to orders given by a corporation with a head, such as the appointment of a servant, and small matters of that description, upon which an action lay for wages, although the appointment was not under seal. No case has gone the length of saying that a corporation may bind itself by a contract not under seal, which does not range within either the small services excepted by the common law, or contracts authorised by parliamentary charter. This Company can only bind themselves by their common seal, or in the statutory mode. Then can they contract for any interest in land, except by an instrument under seal, or executed in the manner which the statute prescribes? I am clearly of opinion that they cannot. If, indeed, instead of being a corporation, the defendant had been a private individual, who, after having occupied for a year, might by parol contract to hold for another year, or as tenant from year to year, his conduct in continuing in possession after the expiration of the term for which he originally took the premises, would be evidence for the jury that he and the plaintiff had mutually contracted with each other that there should be a demise for another year, or even from year to year. But that would be on the ground of an implied contract, arising from the conduct of the parties. These defendants, however, being a corporation, cannot contract by conduct, but only by a binding agreement under seal, or in the statutory mode; so that no fresh interest was created at the expiration of the second year, and the Company are only bound to pay for the time that they actually occupied. If the plaintiff had *by deed* demised the premises to the defendants as tenants from year to year, and they had accepted the tenancy, that

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might have created an interest which would perhaps have rendered the defendants liable. But there is no such case here; it turns entirely on the validity of the contract, and a corporation cannot, as in the case of an individual, by simply paying rent for a past occupation, create a new implied tenancy. The defendants are only liable for the time they actually occupied, and that has been paid for, and longer. I should observe, that in the case of *Sanders v. The Guardians of St. Neots Union*, I never meant to decide that a corporation could contract without seal; but I allowed the case to proceed, because I thought the objection was apparent on the record, and might be raised in arrest of judgment.

PLATT, B.—On consideration, I am of the same opinion. No doubt an injustice is done to the plaintiff, because the defendants have occupied beyond the term agreed on, and have left without giving any notice to quit; but we must administer the law as we find it. The action is founded on the 14th section of the 11 Geo. 2, c. 19; for, until that statute, rent, which savours of the realty, was not the subject of an action of assumpsit. That section, however, enables landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands "*held or occupied*" by the defendants: in an action on the case for the use



being a parol demise or agreement in writing not under seal, whereby a certain rent is reserved. I was inclined to think, that if it could have been made out that the *holding* continued after the expiration of the first year, by reason of the conduct of the defendants, they might be liable; but the words of the section do not warrant the conclusion, that a holding, without use and occupation, will satisfy the statute. In the case of a private individual, who has agreed to become tenant for a year, and continues in possession after the end of that period, it may be inferred that he commences a new tenancy, which will bind him for two years at the least, unless he determines it by previous notice; but that only arises from the conduct of the parties being evidence of a contract. Then what is the capacity of the persons to whom this evidence is to be applied? If they are incapable of contracting by parol, how can the circumstance of their holding over be evidence of a contract? It seems to me, that the cases of *Lamprell v. The Guardians of the Billericay Union* (a), and *Diggle v. The London and Blackwall Railway Company* (b), present an insuperable barrier to the plaintiff's recovering in this action. The private Act does not make any difference, for it applies merely to the case of contracts signed by the directors.

MARTIN, B.—I am of the same opinion. There was no evidence to go to the jury for the purpose of fixing the defendants with any liability. Previously to the 11 Geo. 2, c. 19, s. 14, it was the constant course for parties, who sued in assumpsit on an implied promise to pay money in consideration of the plaintiff permitting the defendant to occupy lands, to be nonsuited, in consequence of proof of a parol demise or agreement reserving a fixed rent. To obviate that injustice, the statute passed, which enabled landlords to recover an equivalent for the rent reserved by

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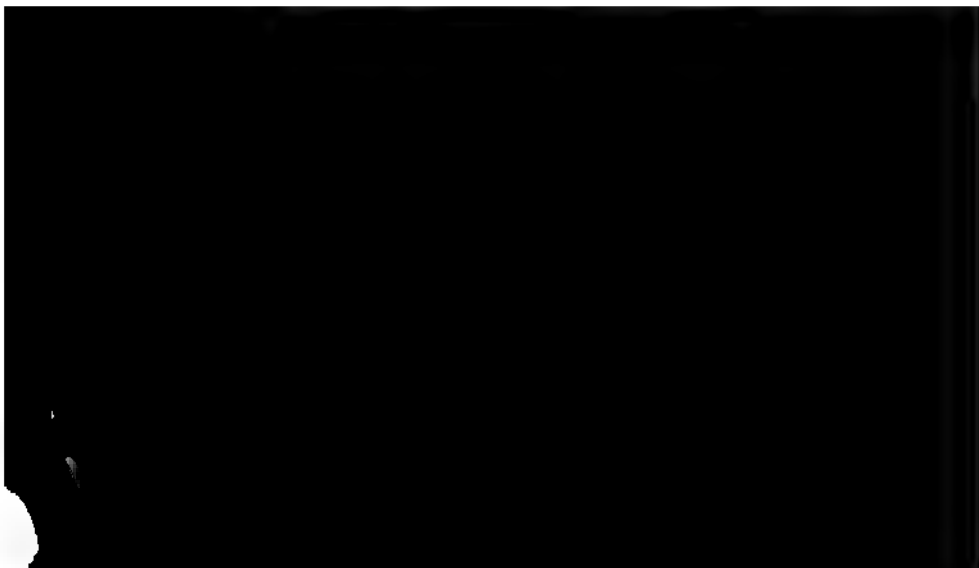
(a) 3 Exch. 283.

(b) 5 Exch. 442.

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a demise; that is, a reasonable satisfaction for the use and occupation; but there must be some occupation by reason of which the defendant becomes liable to pay, and the only effect of proof of a demise at a rent certain is, to fix that amount as the value of the premises. The old doctrine was, that a tenant who held over after his term had expired, was a mere tenant at sufferance; but it is now considered, that, when once he has paid rent, and it has been received by the landlord, it is a question for the jury, whether the former does not become, and the latter accept him as, tenant from year to year, and therefore whether the one is not bound to receive, and the other to give, a notice to quit, in order to determine the tenancy. *Jones v. Shears* (a), and a case of *Greville v. De Rutzen*, in this Court some years ago, shew that a party, by holding over, does not therefore become a tenant from year to year; but the fact is only evidence for the jury of a new contract, or, in other words, the jury draw an inference from certain facts, whereby they create the relation of landlord and tenant. Here there is an insuperable impediment against the jury drawing any such conclusion, because a corporation cannot contract except by deed, or by the means pointed out in the statute.

Rule absolute (b).



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CLEAVE v. JONES, Executrix, &c.

Feb. 10.

ASSUMPSIT by payee against maker of a promissory note, dated the 2nd May, 1840, for payment of 350*l.* with interest, on demand.—Plea (*inter alia*) that the cause of action did not accrue to the plaintiff at any time within six years next before the commencement of the suit. Replication, that the cause of action did accrue within six years. Upon which issue was joined.

At the trial, before *Erle*, J., at the Herefordshire Summer Assizes, 1851, it appeared that the defendant, who was executrix of her late husband, had employed the plaintiff as her attorney in winding up her husband's affairs, and that the note in question was given by the defendant to the plaintiff for money advanced by him to her in the course of that business. In order to take the case out of the Statute of Limitations, the plaintiff tendered in evidence an account-book in the handwriting of the defendant, containing, among others, the following entry:—"1843.—Cleave's interest on 350*l.*—17*l.* 10*s.*" (*a*). It was thereupon objected by the defendant's counsel that the contents of the book were privileged, inasmuch as it had been made out and delivered by the defendant to the plaintiff, whilst he acted as her attorney, and in consequence of the following letter written by him to her:—

"Dear Mrs. Jones,—Will you let me know what your statement is of the debts due from your late husband at the time of his decease, and what have been paid, by whom, and out of what fund. This from you will assist me in preparing the case for counsel.—Yours, &c.,

"J. CLEAVE."

The plaintiff was employed by the defendant as her attorney in winding-up the affairs of her late husband, of whom she was executrix. In the course of that business, the plaintiff requested the defendant to let him have a statement of the debts of her late husband, and what had been paid, in order to prepare a case for counsel. The defendant, in consequence, sent to him an account-book, which contained an item of interest paid on a promissory note given by her to the plaintiff, for money advanced:—*Held*, that the account-book was a privileged communication, and therefore the plaintiff could not, in an action on the note, give in evidence the item of interest paid, in order to defeat the Statute of Limitations.

A Judge at Nisi Prius is

bound to try a collateral issue, where the reception of evidence depends on a preliminary question of fact.

(*a*) See *Cleave v. Jones*, 6 Exch. 573.

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The defendant's counsel then called the daughter of the defendant, who proved that, in consequence of the above letter, the defendant made out the account and sent it to the plaintiff. The learned Judge, having heard the evidence in support of this collateral issue, ruled that the account-book had been delivered by the defendant to the plaintiff confidentially, as her attorney, and was therefore inadmissible in evidence against her; and the plaintiff was nonsuited.

Whateley, in the following Michaelmas Term, obtained a rule nisi to set aside the nonsuit and for a new trial, on the ground of the improper rejection of this evidence.

Gray now shewed cause.—The account-book was a privileged communication, having been delivered by the client to the attorney to enable him to prepare a case for counsel. On the motion for this rule, it was urged that the communication was not privileged, because the plaintiff was aware of the fact of payment, and therefore no confidence was reposed in him by the delivery of a document which merely informed him of what he knew before. But it did not appear that the plaintiff knew the fact, or he might have known it in one sense, though not in such a way as to be enabled to prove it as a witness, which would

independently of his own knowledge; for a mere verbal admission by her of payment of interest would not have sufficed to defeat the Statute of Limitations. In *Wheatley v. Williams* (a), Lord Abinger, C. B., says, "Suppose an attorney, when searching for a deed belonging to his client, found another deed, which might operate to the client's prejudice, can it be said that he would be bound to disclose it? If, therefore, a document be exhibited to the attorney in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the confidential communication." Where an attorney holds a document for a client, he cannot be compelled to produce it by a person who has an equal interest in it with his client: *Newton v. Chaplin* (b). [*Alderson*, B., referred to *Marston v. Downes* (c).] And if a person instructs an attorney with reference to drawing a deed, the communication so made is privileged, notwithstanding the attorney refuses the employment: *Cromack v. Heathcote* (d).

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The Court then called on

Whateley and *Keating* to support the rule.—There is no case which decides the present point. *Cromack v. Heathcote* certainly goes to a great extent; but still, in that case, the information was acquired by the attorney strictly in his character of attorney. The general rule is not denied; but it has no application here, for the plaintiff never acted as the attorney of the defendant in respect of the 370*l.* 17*s.* 10*d.*, which he lent her. The request contained in the letter is confined to a statement of the debts due from the defendant's late husband, and the defendant inserts in the account a statement respecting a debt due from herself. That is no more a privileged communication than if

(a) 1 M. & W. 533.

(b) 9 C. B. 356.

(c) 1 A. & E. 31.

(d) 2 Bro. & B. 4.

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the defendant had written to the plaintiff, saying that she had paid the interest. [*Parke*, B.—It was for the Judge to decide whether the account was given to the plaintiff as a creditor or in his character of attorney; and, after hearing the evidence, he came to the conclusion that it was a statement made by the client to the attorney for the purpose of taking the opinion of counsel.] The facts do not warrant that conclusion, for in this particular transaction the plaintiff was not acting professionally for the defendant, but on his own account. There was no confidence between the parties with reference to the communication in question. The privilege is confined to information acquired solely in the capacity of attorney: *Greenough v. Gaskell* (a). *Weeks v. Argent* (b) decided that where an act is done in pursuance of a bargain between two parties and in the presence of their respective attorneys, the communication by one party to his attorney relating to that act is not privileged. There is no authority to shew that the rule extends to cases in which the attorney seeks to use the information for his own benefit. The rule is founded on the same principle as that which excludes the testimony of a wife against her husband—viz. public policy: *Stark. Evid.* Vol. 2, pp. 320, 549, 3rd ed. [*Alderson*, B.—That argument would go to this extent, that if I

and he asked, "supposing the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?" There is no difference in principle between such a case and the present. At all events, there are authorities to shew that, if in order to determine whether a communication is privileged it is necessary to try a collateral issue, the Judge will not try it. In Taylor on Evidence (a), it is said, "indeed it has more than once been laid down, that though paper and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admission, provided they be pertinent to the issue; for the Court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it raise an issue to determine the question: *Legatt v. Tollervey* (b), *Jordan v. Lewis* (c), *Doe v. Date* (d), *Comm. v. Dana* (e)." Now if the Courts will not try a collateral issue as to the mode in which a document was obtained, the same rule will apply to the question of privileged communication. [Parke, B.—All collateral matters as to the admissibility of evidence are to be decided by the Judge, and he may for that purpose receive evidence on both sides. No point is more clear than that. There may be some inconvenience in the practice, but it is necessary for the administration of justice. In a criminal case at York, some years ago, I became aware beforehand that a question would arise as to the sanity of a person who was to be examined as a witness, and, before I went the circuit, I consulted all the judges on the subject, and they were of opinion that I ought to receive evidence as to his insanity; and accordingly, when he was objected to, I received evidence on both sides upon that collateral issue.]

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(a) Vol. 1, p. 623.

(b) 14 East, 302.

(c) Id. 305, n.

(d) 3 Q. B. 619.

(e) 3 Metc. (Am. Rep.) 329,
337.

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PARKE, B.—The rule ought to be discharged. The first question is, whether the communication of the account was made by the defendant to the plaintiff in his character of attorney, or in that of a creditor, for the purpose of shewing how the account stood. If in the latter, it would be admissible. We are now to decide as to its admissibility if made in his character of attorney. Whether it was in point of fact so made was a matter which the Judge had to try when the account was offered in evidence. Now it was objected that this was a privileged communication, and the Judge received evidence to shew that it was; and after hearing the evidence on the subject, he decided that this account was given by the defendant to the plaintiff, not in his character of creditor, and for the purpose of shewing how the account stood between them, but in his character of attorney, in order that he might prepare a case for counsel. That ruling was perfectly correct, for the account was not made out until after the plaintiff's letter requesting to have it. Therefore, the whole contents of that book are privileged, for it was given in the course of that free and unreserved communication which the law protects, in order that the entire facts may be disclosed by the client to the attorney. Then is the present case excepted from that rule? It is argued that it ought to form an exception, because the fact of the payment of the 17l. 10s. was known

that cannot be separated from the rest; the whole must be taken or the whole rejected.

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PLATT, B.—I am of the same opinion. The plaintiff relied upon the account for the purpose of taking the case out of the Statute of Limitations; the defendant did not deny that the interest was paid, but raised a technical objection to the production of this evidence, in consequence of which the document was rejected. For the sake of argument, we may assume that the debt was due, and that the defendant had no other mode of defeating the action. If so, it is a hard matter that the nonsuit should remain, because the parties to the suit may be examined at a new trial, so that the case in substance is the same as if, after the last trial, a witness had been discovered who could prove the fact of payment. I therefore think that there ought to be a new trial; but as other members of the Court are of a different opinion, the rule must be discharged. With regard to this being a privileged communication, at first I entertained some doubt on the subject; but I am now satisfied that it is privileged. The account would never have been given except in the course of professional business, and for the express purpose of preparing a case for counsel. The attorney had no more right to use that document than any deed deposited with him by his client; for there is no question that he would never have possessed it were it not for the confidence reposed in him by his client. The rule must, therefore, be discharged; but I am sorry that a new trial cannot be granted on payment of costs, as the real merits of the case have not yet been tried.

MARTIN, B.—Upon the main point I am also of opinion that the rule ought to be discharged, though I concur with my Brother *Platt* in thinking that, under the circumstances, there ought to be a new trial on payment of

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costs. Whenever an objection is taken to the admissibility of evidence, the Judge is bound to try any collateral issue on which it depends, and to determine the law arising from the facts proved, in the same manner as a jury decides matters of fact. In *Wright v. Doe d. Tatham* (a), a preliminary question of that kind arose, and the Judge came to a certain conclusion; but that was subject to review in a Court of error, like any other matter of fact, though in one sense it was a matter of law. The question here arises for the first time, whether, under the particular circumstances of this case, the communication is privileged. In general, it is the attorney who declines to give evidence, on the ground of professional confidence; but it is no doubt competent for the client, as in this case, to take the objection, and call witnesses to prove the incompetency, and the Judge is to determine the law arising from the facts. Here the Judge arrived at a particular conclusion, and I never had any doubt about the soundness of his doctrine. The account was sent to the attorney in order to have a case prepared for counsel. The client inserts in it something which was not necessary for that purpose; but if she bonâ fide believed that it was necessary, the communication was privileged, and could not be divulged through the medium of the attorney, though the fact might be proved in some other way.



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DANIEL v. WILKIN and Others.

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REPLEVIN.—The defendants made cognisance as the receivers and bailiffs of the Crown, for arrears of a fee farm rent of 50s. per annum, whereof her Majesty, at the time in the declaration mentioned, was seised in fee in right of the Crown of England, payable half yearly, on &c., in respect of certain tenements holden of our said Lady the Queen, in the said county of Denbigh, as of her castle and lordship of Denbigh, of which the said closes in which &c. were parcel. Plea in bar (amongst others), that the said closes in which &c. were not parcel of the said tenements holden of our Lady the Queen in the said county of Denbigh, as of her castle and lordship of Denbigh, in manner and form, &c.; on which issue was joined.

At the trial, before *Wightman, J.*, at the last Denbighshire Assizes, it appeared that the rent in question was reserved by letters patent of the 25th of September, 4 Car. 1, (1628), whereby the King granted to Edward Ditchfield and others, and their heirs (amongst other hereditaments in the county of Denbigh and elsewhere) "All those escheat lands and tenements, with the appurtenances, containing by estimation 112 acres of arable, meadow, feeding, pasture, and woodland, with the appurtenances, situate, lying, and being in the vill of Kernenevett, now or late in the tenure or occupation of David ap John ap David, or his assigns, and by a particular thereof mentioned to have been lately demised to Thomas Middleton, and to be of the yearly rent or value of 50s.; which premises, by the


Queen Elizabeth, in the 9th year of her reign, granted the lordship of Denbigh in fee to the Earl of Leicester, who mortgaged it to the Corporation of London, and died in the 30th Eliz. In the 33rd Eliz. the corporation conveyed the lands to the Crown, and covenanted to deliver up all muniments of title, surveys, &c., and the property has ever since remained in the possession of the Crown. In the reign of Charles I., the Crown granted in fee farm "a messuage and escheat lands and tenements, containing by estimation 112 acres of arable, &c. lands, situate in the vill of Kernynyved, now or late in the tenure or occupation of David ap John ap David." In replevin of a distress for

this rent, made in certain closes of a farm called Plas Bach, the defendant, for the purpose of proving that Plas Bach was parcel of the 112 acres of escheat lands out of which the rent issued, tendered in evidence the following Survey, from the office of Land Revenue Records:—"Lordship of Denbigh—Survey taken in the reign of Queen Elizabeth 11th. The Comot of Kynmerch. The presentment of the jury of survey for ferm lands within the Comot of Kynmerch." Various townships were then mentioned, and amongst them Kernynyved; as to which it was stated, that David ap John ap David occupied certain parcels of land, and, amongst them, one messuage called "y Place Baghe," and in the margin were the words, "Acres 112, 1l. 3s. 4d." The defendants also gave in evidence the accounts of the Crown Ministers for the lordship of Denbigh, in the time of Elizabeth and James I., containing references to other parts of the Survey:—*Held*, that the Survey was not admissible in evidence.

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particular thereof, were mentioned to be parcel of the lordship of Denbigh, parcel of the possessions annexed to the Principality of Wales, and late parcel of the possessions of Robert Earl of Leicester, and formerly parcel of the possessions of the Earl of March:" Habendum to the grantees in fee farm for ever, to hold of the King, his heirs and successors, as of his castle and lordship of Denbigh, by fealty only, in free and common socage, and not in chief, nor by knight's service; rendering yearly to the King, his heirs and successors, 50s. of lawful money, &c., at the feasts of &c., yearly &c.

The closes in which the distress was taken were part of a small farm called Plas Bach, occupied by the plaintiff as tenant of a Mr. Peters, the owner of an estate called the Plas Postyn estate, in the parish of Llanrhaidr-yn-Cinmerch, in the county of Denbigh; and ultimately the only question in the cause was, whether this farm was shewn to be parcel of the 112 acres of escheat lands, in respect of which the rent in question was reserved. For the purpose of proving this, the defendants tendered in evidence an examined copy of so much of a Survey of the lordship of Denbigh as related to the vill or township of Kernenevett. This Survey bore date the 11th Eliz. (1569), at which time the lordship of Denbigh was in the hands of Robert Earl of Leicester, to whom it had been granted in fee by Queen



“ David ap John
ap David.

“ Foulk ap David
ap Sir John.

“ Holdeth or occupieth one piece of ground containing three acres of arable land in Kernynyved aforesaid, lying between the lands of David ap John ap Griffith Goch on the east and south sides, and the ditch of Postyn Park on the north side, and the lands of the said Earl, in the occupation of Robert Rutter, on the west side. Also one messuage, one barn, one cottage, called y Place Baghe, nine closes containing nine acres, also six acres of wood and underwood; moreover one Fryth, called Fryth yr Wayn-Shett, containing 31 acres: also one Fryth called Y Tyr Goz, containing 58 acres of arable land, and two acres of meadow, lying and being in Kernynyved aforesaid, between a little river called Aber y Fryth Varghnad on the south side, and a little river called Aber Bryn y Castell on the north side, and the lands of David ap John ap Gruff Goz on the east side, and the Wayn Shett commons on the west side: also one close called Kay Kernynyved, containing by estimation three acres, lying between the commons on the east and south sides, and the township of Brynbage on the west and north sides: all which premises lie in Kernynyved aforesaid, in the occupation of the said David ap John ap David, for the yearly rent of

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“ Acres 112,
£1 : 3 : 4.”

It appeared that, on the death of the Earl of Leicester, (30 Eliz.) the lordship of Denbigh was seized into the hands of the Crown; and by a deed of the 10th of May, 33 Eliz. (1591), it was conveyed absolutely by the Corporation of London, (to whom it had been mortgaged by the

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Earl), to the Queen, her heirs and successors. This deed contained a covenant on the part of the corporation to deliver up to the Queen, her heirs and successors, or into the receipt of her Exchequer, on or before, &c., "all such charters, letters patent, deeds, evidences, writings, escripts, court-rolls, *books of survey*, terriers, rentals, and other muniments whatsoever, concerning the premises, as were in their possession, authority, or power:" and a great number of such documents are now remaining of record in the custody of the Deputy Keeper of the Land Revenue Records and Enrolments, amongst which is the above-mentioned survey: and the Deputy Keeper stated, that no other survey of earlier date was to be found in the office, which included the Comot of Kynmerch.

The defendants also gave in evidence examined copies of the ministers' accounts for the lordship of Denbigh (in the same custody) from the 34 Eliz. downwards. In the account of the 34 Eliz., under the title "*Kernenevett*," the receiver answered "for 10*l*. of the rent or farm of a messuage, barn, and certain lands to the same appertaining, containing by estimation — acres, now or late in the tenure of David ap John ap David, and now in the tenure of Foulk ap David, by the rent of 50*s*. yearly." At the foot of this account was the following note of the receiver, relating to three closes of land, for the rent of which he

50s. of the farm of all that messuage or tenement, with the appurtenances, now or late in the tenure or occupation of David ap John ap David, lying in the vill aforesaid, and of all those escheat lands and tenements, with the appurtenances, containing by estimation 112 acres of arable, meadow, feeding, pasture, and wood land, with the appurtenances, situated in the vill aforesaid, now or late in the tenure of the said David ap John ap David." In the same account, the receiver, answering for 2s. 8d. for the rent or farm of certain lands in the tenure of Henry Lloyd, had annexed thereto the following marginal note:—"Note: This is 6s. 6d. rent in the old survey in my Lord of Leicester's time:" which appeared, in reference to the survey of the 11 Eliz., to be the case.

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The deputy record keeper stated that, according to the ancient documents, the vill or township of Kernenevett contained about 2000 acres of land, but its name and limits were now unknown.

The admission in evidence of the survey above mentioned was objected to on the part of the plaintiff; but the learned Judge received it. Evidence was given to establish the identity of the tenement called "y Place Baghe," therein mentioned, with the plaintiff's farm of Plas Bach; and the jury found a verdict for the defendants.

In last Michaelmas Term, *Willes* obtained a rule nisi for a new trial, on the ground that the survey was not admissible in evidence, citing *Evans v. Taylor* (a) and *Duke of Beaufort v. Smith* (b).

The *Attorney-General*, *Welsby*, *Wilkin*, and *E. Beavan* now shewed cause.—The survey was properly received. It purports on the face of it to be the presentment of a jury, acting, as it will be presumed, under a legal authority. It was no doubt delivered to the Crown by the Corporation of London, to whom the land had been mortgaged by

(a) 7 A. & E. 617.

(b) 4 Exch. 450.

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the Earl of Leicester, and it has ever since formed part of the muniments and title of the Crown. [*Martin, B.*—It is merely a private survey of the Earl of Leicester, and, as it appears to me, is entitled to no more weight than if a letter of the Earl of Leicester had been produced stating that David ap John ap David was his tenant.] From the 33 of Eliz. to the present time, the survey has been adopted by the Crown as evidence of what was contained within the boundary of the vill, and treated as an authentic muniment of its title. It is referred to in the ministers' accounts by the Crown officer as the basis of the Crown's title, and consequently the same credit ought to be given to it as if it had been made when the property belonged to the Crown. There is sufficient on the face of it to enable the Court to give effect to it as an inquisition. An ancient extent of Crown lands, found in the office of Land Revenue Records, and purporting to have been made by the steward of the Crown lands, was held to be evidence of the title of the Crown to lands therein mentioned, and stated to have been purchased by the Crown of a subject: *Doe d. Will. IV. v. Roberts (a)*. There the evidence was not offered with reference to a question of boundary, but in support of title. The same principle applies here, the rule of law being that greater faith is to be given to documents made by persons acting under the solemn authority and for the benefit of the

the same as if they had made it themselves; but it did not appear that it had been approved of by them.] Enough appeared to shew that they had examined it, and adopted it as the basis of the Crown's precedent title. In *Rowe v. Brenton* (a), a document from the office of the Duchy of Cornwall, purporting to be a caption of seisin to the use of the Duke, by persons assigned by his letters patent to receive seisin, was admitted in evidence as a public document, for the purpose of proving not only that the Duke had seisin of the Duchy at the time stated, but also of what he had seisin, notwithstanding the Duke is a subject only. [*Parke, B.*—He has jura regalia.] At all events this survey, having, as it appears, been made by competent persons of the locality, is evidence of *reputation* as to what was comprised within the limits of the antient vill, of which now no trace exists. [*Parke, B.*—It did not appear from whence the jury were summoned.] It will be presumed that they were summoned from the locality, and were cognisant of the facts. In *Evans v. Taylor* (b), it did not appear that the deputy-surveyor, by whom the survey purported to have been made, had any authority to institute the inquiry; so that no presumption could arise that he did make it. In this case a sufficient presumption of verity exists. It is impossible to give direct proof of authority; all that can be expected is, that it should be reasonably apparent on the face of the document that it was a presentment made by persons having a knowledge of the subject-matter at the time of the inquiry. The circumstance of the document not being signed by the jury does not affect the case. A customary of a manor, appearing to be of great antiquity, and delivered down with the court-rolls from steward to steward, although not signed by any person, was held good evidence to prove the course of descent within the manor: *Denn d. Goodwin v. Spray* (c). So also, ancient answers of convention-

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(a) 3 Man. & R. 156; 8 B. & C. 747. (b) 7 A. & E. 617.

(c) 1 T. R. 466.

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ary tenants of a manor, stating the rights of the lord, are admissible in evidence, even against the freeholders of the manor: *Crease v. Barrett* (a). In *The Duke of Beaufort v. Smith* (b), *Parke*, B., and *Alderson*, B., express some doubt whether the case of *Evans v. Taylor* was correctly decided, the latter observing that, "if the document was, as it appears to have been, a declaration by the jury themselves, it would have been receivable as evidence of reputation." Here the document is of that nature. In the case of *The Duke of Newcastle v. The Hundred of Brixtowe* (c), certain orders of sessions were held admissible as evidence of reputation that Nottingham Castle was within the Hundred of Brixtowe. And in *Williams v. Goodchild* (d), Sir *John Leach*, V. C., admitted a catalogue, or particulars of sale, made in the year 1756, as evidence of reputation that the lands therein mentioned were at that time tithe free. Again, in *Evans v. Rees* (e), a presentment in a manor court, setting forth the bounds of a manor, was held admissible as evidence of such bounds, though part of the document, unconnected with the subject of bounds, was cut.

Willes (with him *Wynne Foulkes*, and *Coxon*), in support of the rule.—The survey was not admissible in evidence. It is a mere statement, made by the authority and for the



the guidance of other ministers, with reference to a particular survey, cannot have the effect of incorporating whatever is contained in it. Mention is not made of the survey for the purpose of giving authenticity to it, but as mere recital of what is found in that document.—He was then stopped by the Court.

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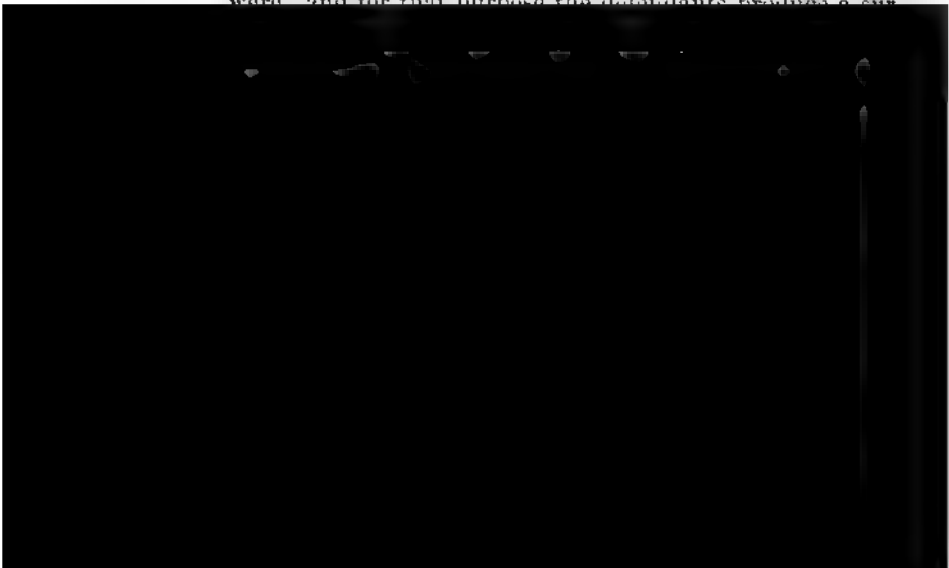
PARKE, B.—The rule must be absolute. The document in question was not, I think, admissible in evidence, except, perhaps, for the purpose of furnishing evidence of reputation as to the boundary of this vill; but that would not advance the case of the defendants, for the object of tendering it was to shew, not that the land in question was within the vill of Kernenevett, but that it was the property of the Earl of Leicester, which had been demised by him to David ap John ap David, and so that it was parcel of the land out of which the rent issued. Now this is a survey made in the 11 Eliz., by direction of one of the commissioners of the Earl of Leicester, and is no more evidence of title than a survey or map of any landed gentleman. The ground on which a survey made by officers of the Crown under a commission is received, is, that it is presumed that they acted in accordance with their public duty, and have stated nothing in their inquisition or survey which is contrary to the fact. But no such presumption of truth attaches to a survey belonging to a private individual, although the presentment of a jury might be evidence of reputation. Certainly, the case of *Evans v. Taylor* goes to that extent. This case, however, differs from *Evans v. Taylor*, for there the document was an original presentment of jurors at the court of survey, who may be presumed to be sufficiently cognizant of the local customs and boundaries of the manor. It is not, however, necessary to decide that point. Therefore, I think that this document, *per se*, was not admissible as evidence of the title of the Crown; and it is useless as evidence of re-

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putation, even if admissible for that purpose. Then it was argued, that the survey was made evidence by the reference to it in the ministers' accounts. If, indeed, the ministers had stated in their accounts, that, having power for that purpose, they had examined into the matters mentioned in the survey, and had ascertained what the Crown lands were, their finding on a public document would probably have been admissible, on the ground before stated. But here, even supposing that the ministers had power to find the fact, they have not found it, for all they have done is to make inquiry respecting particular rents stated in their accounts, and they only find that the survey is correct in those two respects, but not generally. For these reasons, I think that this document was inadmissible, and consequently there ought to be a new trial.

PLATT, B., concurred.

MARTIN, B.—The difficulty which my Brother *Parks* has expressed is the very difficulty which I have had throughout the argument. King Charles the First granted certain lands subject to a rent, and those were the lands which had been demised by Lord Leicester to David ap John ap David. Then the question is, to find out what those lands were, and for that purpose the defendants produce a sur-



1852.

(BEFORE PARKE, B., AND PLATT, B.)

STANCLIFFE, Appellant; CLARKE, Respondent.

Feb. 21.

THE following case was stated for the opinion of this Court by the Judge of the County Court of Cheshire holden at Macclesfield:—

This action was brought to recover the sum of 50*l.*, in full satisfaction of the larger sum of 57*l.* 19*s.*, the plaintiff having abandoned the excess. The cause of action, as stated in the summons and particulars, was “for money paid by the plaintiff for the use and on account of the defendant to F. Brindley, R. Brindley, and W. Thomas, upon a judgment obtained by them in this Court, as indorsees of a promissory note of the plaintiff and one R. Ward, made payable to the defendant or order, but for which promis-

The defendant, a brewer, let to the plaintiff a public-house, on the terms (among others) that the plaintiff should purchase of the defendant all the malt liquor consumed on the premises: provided that, in case of any breach of that agreement, the plaintiff should forfeit, as liquidated damages, the sum of 50*l.*, secured by

the promissory note of the plaintiff. The defendant indorsed over the note for value; and the plaintiff, having been compelled to pay it, entered a plaint in the county court against the defendant, and stated in the summons and particulars that “the cause of action was money paid for the use of the defendant to the indorsees of the note, for which he never received from the defendant any value or consideration.” At the trial before a jury it appeared that, on the plaintiff’s taking possession of the premises in October, 1849, he commenced ordering beer from the defendant, and continued to do so until February, 1850. The plaintiff proposed to prove that the beer supplied by the defendant subsequently to Christmas, 1849, was unmarketable. This evidence was objected to, but received by the judge. The defendant submitted that there was no case for the jury, and that the plaintiff must be nonsuited. The plaintiff refused to be nonsuited; and the judge left it to the jury to say whether the liquor supplied by the defendant was of a marketable quality; and they found a verdict for the plaintiff. On appeal to this Court under the 13 & 14 Vict. c. 61, the case, which was stated by the judge, set out his direction to the jury, though not necessary to render intelligible the points of law which he formally submitted for the opinion of the Court:—*Held*, in answer to the questions so submitted, first, that the term “nonsuit” in the 9 & 10 Vict. c. 95, has the same meaning as in ordinary legal proceedings, and consequently that the county court judge had no power to nonsuit the plaintiff against his will, but, in the absence of any case for the jury, should have directed a verdict for the defendant.

Secondly, that the same rule of construction should be applied to the summons and particulars in the county courts as in the superior Courts; and therefore, in this case, the summons and particulars sufficiently described the cause of action, as the defendant could not have been misled by them; and that evidence as to the quality of the beer was admissible under them.

Held, also, that, under the 13 & 14 Vict. c. 61, ss. 14, 15, the Court of appeal is not confined to the precise questions submitted to them, but may decide upon the whole case as stated; and therefore, looking at the summing up in this case, it was erroneous; for the circumstance of the defendant having on one or two occasions supplied the plaintiff with bad beer, did not authorise him to avoid the contract, but he should have returned the beer, and, if better were not sent instead of it, he might, on the particular occasion, procure some elsewhere; and if the defendant continued to send bad beer, he might sue him on the implied contract that he would supply beer reasonably fit to be drunk.

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sory note the plaintiff or the said R. Ward never received from the defendant any value or consideration."

At the trial, which took place before a jury, the following evidence was given by or on behalf of the plaintiff:—In September, 1849, the plaintiff applied to one Barber to transfer or sub-let to him a public-house which he was about to leave, having occupied the same for many years as tenant from year to year to a person of the name of Latham. Barber referred the plaintiff to the defendant, to whom, as he stated, he was under a previous engagement. The plaintiff accordingly called upon the defendant, and an arrangement was then made, which formed the basis of the following agreement:—"Memorandum of an agreement made and witnessed this 17th day of October, 1849, between Joseph Stancliffe, of &c., common brewer, of the one part, and Robert Clarke, of &c., innkeeper, of the other part; whereby the said J. Stancliffe doth agree to accept the said R. Clarke, and the said R. Clarke doth agree to take all that messuage or tenement, dwelling-house and public-house known by the name of 'The Swan with Two Necks,' situate at Chestergate, in Macclesfield, late in the occupation of John Barber, together with all rights &c. to the same premises belonging, to hold the same unto the said R. Clarke, as tenant from year to year

“And the said R. Clarke doth also hereby agree not to let or assign the said premises without the license and consent in writing of the said J. Stancliffe, his executors, &c.; and also doth agree to purchase from the said J. Stancliffe the whole of the ale, beer, and porter which shall be drunk or consumed in or upon the said premises, and to keep a sufficient stock of malt liquors thereon: Provided always, that in case of a breach or non-performance of any of the above terms and agreements on his part, the said R. Clarke shall forfeit and pay unto the said J. Stancliffe, his executors, &c., the sum of 50*l.*, to be secured by the joint and several promissory note of hand of him the said R. Clarke and R. Ward, of Macclesfield aforesaid, inn-keeper, such money to be recoverable as and for liquidated damages. As witness the hands of the parties &c.

“JOSEPH STANCLIFFE.

“ROBERT CLARKE.”

This agreement was executed by the plaintiff on the 17th of October, 1849, and at the same time the note referred to in the summons and particulars was signed by the plaintiff and Ward as his surety; which note was as follows:—

“Macclesfield, 17th October, 1849.

“On demand, we jointly and severally promise to pay to Mr. Joseph Stancliffe or order the sum of Fifty Pounds, for value received.

“ROBERT CLARKE.

“ROBERT WARD.”

Immediately on the completion of these documents, the plaintiff paid for the fixtures, and took possession of the premises, receiving the key from Barber, to whom he communicated the fact that an arrangement had been made. Up to this time no notice to quit had been given or received by Barber, nor had he done any act whereby his tenancy was determined. About the middle of November,

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Latham applied to the plaintiff for the rent which had become due from Barber on the 12th of October then last past. In consequence of what then transpired, Barber and the plaintiff called upon Latham; when, after paying his rent, Barber made certain proposals by which he would have been relieved from all further liability, but no arrangement was come to. At the same interview, the plaintiff told Latham that he had taken the premises from the defendant and Barber. In January, 1850, the plaintiff paid the defendant 5*l.* 13*s.* 4*d.* for a quarter's rent, less property tax. About the middle of February, the plaintiff agreed with Latham to take a lease of the premises from him for three years, commencing on the 12th of October then last past, at an increased rent. A lease was prepared and executed on the 12th of March, 1850. In the course of March, Latham served the defendant and Barber with notice to quit. In April, the plaintiff sub-let the premises to Royle, who left in a few days, when he again sub-let them to Ashworth, who was in possession till after the commencement of these proceedings. On taking possession of the premises in October, 1849, the plaintiff commenced ordering ale and porter from the defendant; and such orders were received from time to time until the middle of February in the following year, when, in consequence, as the plaintiff alleged, of the inferior quality of

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beer supplied was in fact of an inferior quality or in bad condition, but that no portion of it had been returned or rejected: and lastly, it was proved that in September, 1850, the defendant indorsed the promissory note to Brindley and Thomas, who sued the plaintiff and Ward for the amount, and recovered judgment for 57*l.* 19*s.* debt and costs, and that the plaintiff had satisfied that judgment. On this state of things, the defendant's advocate submitted that there was no case for the jury, and that the plaintiff must be nonsuited—for that the only question under the summons was, whether there had been *any* consideration for the promissory note mentioned therein; that the agreement of the 17th of October was such consideration; that the plaintiff had upon his own shewing broken it by ceasing to deal with the defendant, and also by sub-letting; that in either case he was liable for the 50*l.* for which the note was made; and that he could not recover that sum as money paid to the defendant's use, the agreement never having been rescinded. The plaintiff refusing to be nonsuited, the judge ruled that the case must go to the jury. No witnesses having been called for the defendant, the judge, in summing up, directed the jury (*inter alia*), that the breach by the plaintiff of any one of the stipulations contained in the agreement of the 17th of October, 1849, would entitle the defendant to a verdict; but that, if the jury should be of opinion (which was scarcely possible in the face of his own admissions) that the plaintiff had observed them all except in ceasing to deal with the defendant for ale, &c., they would then say whether the liquor supplied was of a marketable quality. The jury found for the plaintiff generally, damages 50*l.*

The questions for the opinion of the Court are:

First, whether the judge ought not to have nonsuited the plaintiff, notwithstanding the latter's refusal to be nonsuited.

Secondly, whether evidence as to the quality of the

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liquor supplied by the defendant to the plaintiff was admissible (a).

Welsby for the appellant.—First, the judge of the county court had power to nonsuit the plaintiff, notwithstanding his refusal. The 79th section of the 9 & 10 Vict. c. 95, enacts, that, “if, upon the day of the return of any summons, or at any continuation or adjournment of the said court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be struck out; and if he shall appear, but shall not make proof of his demand to the satisfaction of the court, it shall be lawful for the judge to nonsuit the plaintiff, or to give judgment for the defendant,” &c. [*Parks*, B.—That must mean “nonsuit” in the ordinary sense of the term.]—Secondly, the judge misdirected the jury, in leaving to them the question whether the liquor supplied was of a marketable quality. There was an absolute contract on the part of the plaintiff to purchase from the defendant all the liquor consumed on the premises; and the fact of some unmarketable liquor having been supplied would not release the plaintiff from that obligation, but would only form the subject of a cross action: *Weaver v. Sessions* (b).

The Court called on

that bad malt was habitually sent; the allegation that the plaintiffs supplied "divers quantities of bad malt" would be supported if on two occasions only the malt was bad. Although the plaintiff may have a remedy by cross action, that would not prevent him from availing himself of the subject-matter as a defence to an action on the contract. The objection to the evidence was, not that it was inadmissible to prove the fact for which it was offered, viz. that the note had been forfeited, but that it was inadmissible under the summons; and the direction of the judge must be considered with reference to that objection. [Parke, B.—The summons and particulars state that the plaintiff seeks to recover because the note was made without consideration. Now, there was good consideration for it, namely, the demise from the defendant; and the real objection is, that the plaintiff ought not to have been compelled to pay it, because it was made upon a condition that it should not be enforced unless there was a breach of the agreement, and there had been none. Very minute particularity is not required in these summonses and particulars; but does this particular inform the defendant of the real ground of action?] No objection was made to the summons or particulars, and the defendant was perfectly aware of what the plaintiff's case was.

Welsby in reply.—The meaning of the second question is, whether evidence as to the quality of the liquor was admissible *under the particulars*. It is submitted that it was not. The sole ground of action stated in the particulars is the want of consideration for the note; but the plaintiff's case at the trial was, that the right to enforce it was suspended, because there had been no breach of the agreement. The defendant could not be prepared to meet such a case. But even putting the largest interpretation on the particulars, the evidence was not, in a proper sense, admissible; for *Holcombe v. Hewson* shews that proof

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of bad beer having been supplied on one or two occasions only was not relevant to the question in issue; and nothing more appears on the evidence in this case than that "*some* of the beer was of an inferior quality;" which, however, the plaintiff did not return. The plaintiff was not on that account entitled to discontinue altogether his dealings with the defendant. The direction, therefore, of the judge, in leaving it to the jury whether the liquor supplied was of marketable quality, was erroneous. And if the Court can see that this was so, they will not be bound by the precise questions submitted, but decide according to the merits of the case.

PARKE, B.—In this case certain questions are submitted to us by the judge of the county court; and we are to pronounce, not whether or no there was a wrong verdict upon the evidence, but whether in point of law the case was rightly decided. The first question is, whether the judge ought not to have nonsuited the plaintiff notwithstanding his refusal to be nonsuited. A clause in the statute directs the judge to nonsuit in the event of the plaintiff appearing and not making proof of his demand to the satisfaction of the court. I take it that the term "nonsuit" is there used in the same sense as in ordinary law proceedings, that is, it is optional with the plaintiff whe-



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particulars.] Now if these particulars are to be strictly construed, the statement contained in them is not true; for there is no proof that the defendant received the note without value or consideration; on the contrary, it appears that the defendant entered into an agreement with the plaintiff that he would demise to him a public-house at a certain rent, with a contract that the plaintiff should purchase from him all the ale and beer which should be consumed on the premises. This agreement was entered into by the defendant without having any title; and at the same time, and bearing the same date, the plaintiff gave the promissory note, which he was ultimately compelled to pay. There is a stipulation in the agreement, that in case of any breach or non-performance of any of its terms, the plaintiff shall forfeit and pay to the defendant the amount of the note as liquidated damages. Therefore the true account of the transaction is, that the note, which the plaintiff was compelled to pay, was a note given for value, because it was a security for the performance of the agreement, and made in consequence of the demise, which was a benefit to the plaintiff, although the defendant had no power to demise, for the plaintiff got possession under the agreement, and continued in possession for a considerable time. So, no doubt, there was sufficient consideration for the promissory note, and consequently if the plaintiff is to be bound by his particulars, taken in a strict sense, he cannot recover on the ground stated. But for the sake of doing substantial justice, we must, I think, deal with these particulars in the same way as with particulars of demand in the superior Courts, and inquire, not whether the statement is accurate in all respects, but whether the defendant has been misled by them. Now in my opinion the defendant could not have been mistaken as to the fact, that the plaintiff was seeking to recover by reason of his having been compelled to pay the amount of the promissory note, which, as between him and the defendant, he was not bound to pay. That is the real meaning of the particulars; and consequently the plain-


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tiff was at liberty to shew that the note, though given for valuable consideration, was given on condition only, and could not be enforced until that condition was broken. The defendant, who knew perfectly well the circumstances under which the note was given, could not have been misled as to his defence to the action, for he must have supposed that the plaintiff was simply seeking to recover on the ground that he was not bound to pay the note. The second question must therefore be answered in the affirmative, that under this particular, with that liberal interpretation which it ought to receive, it was competent for the plaintiff to shew that the agreement was performed; and on the other hand, for the defendant to shew a breach of it, which entitled him to enforce the promissory note.

[His Lordship then adverted to the third question, and proceeded:]—

That disposes of all the points included in the questions formally put to us. But then comes a matter upon which my Brother *Platt* at first entertained some doubt, but has now come to the same conclusion as myself, namely, whether under the 13 & 14 Vict. c. 61, which gives the appeal, we are not strictly confined to the questions submitted to us by the judge of the county court. The 14th section of that statute enacts, “that if either party in any cause of the amount to which jurisdiction is given to the county courts



such appeal shall be in the form of a case agreed on by both parties or their attornies; and if they cannot agree, the judge of the county court, upon being applied to by them or their attornies, shall settle the case and sign it &c." Now, here the judge does not confine himself simply to asking the three questions, and stating facts sufficient to render them intelligible, but he sets out his own direction to the jury; and we must assume that there was some object in doing so. Looking, then, to the summing up, I cannot help thinking that it is erroneous. The judge directed the jury (*inter alia*), "that the breach by the plaintiff of any one of the stipulations contained in the agreement of the 17th of October, 1849, would entitle the defendant to a verdict." That is perfectly true; but he goes on to say, "if the jury should be of opinion that the plaintiff had observed them all, except in ceasing to deal with the defendant for ale, &c., they would then say whether the liquor supplied was of a marketable quality." It is difficult to see how they could have been of opinion that the plaintiff had observed all the conditions with that exception, for there was evidence that he broke one of them, by sub-letting without the defendant's consent in writing. In strictness, however, the judge ought not, on the evidence of the plaintiff, to have left to the jury the question whether the liquor was of a marketable quality; for if on one or more occasions the liquor was of an unmarketable quality, that did not authorise the plaintiff to avoid the contract, and transfer his custom elsewhere. His contract is to purchase from the defendant the whole of the ale and porter consumed on the premises; and if that contract is literally construed, the quality of the liquor is immaterial. But on a reasonable construction of it, the plaintiff certainly was not bound to accept liquor unfit to be drunk, and consequently there was a corresponding implied obligation on the part of the defendant to supply liquor of a proper quality. Then, what is the consequence of bad liquor being sent? The plaintiff was at liberty to return it, and if better could not

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be procured on that particular occasion, to get some elsewhere; and if the defendant continued to supply bad liquor, the plaintiff might sue him on the implied contract. Therefore, it does not follow that because on some one occasion the liquor was bad, that the plaintiff had a right to dispense altogether with the contract; and as the direction of the judge was wrong in that respect, there must be a new trial. Probably, at the next trial, the jury will be asked whether the plaintiff has not violated the agreement by sub-demising without the consent of the defendant in writing, in which case the plaintiff cannot recover.

PLATT, B.—I am of the same opinion. The defendant demised to the plaintiff a public-house at a certain rent; and the plaintiff entered into two stipulations, one not to underlet without the defendant's consent in writing, the other to purchase from the defendant all the malt liquor consumed on the premises. For the purpose of securing a due performance of this agreement, a promissory note for 50*l.* was given by the plaintiff to the defendant. It appears by the evidence, that the plaintiff ceased to purchase his beer of the defendant and sublet the house, so that there were two clear breaches of the agreement. The defendant indorsed over the note, and the plaintiff was compelled to pay the amount to the indorsees. The plaintiff thereupon



was whether he had any right to sue on the note,—for the indorsees were only suing for his benefit? Therefore, I think that there is no valid objection to the particulars, inasmuch as the defendant could not have been misled by them. Then, as to whether the judge was justified in nonsuiting the plaintiff, most unquestionably he had no right to nonsuit. The meaning of a nonsuit is, that the plaintiff will not stay in Court to hear the verdict of the jury. But if he chooses to take their opinion, and the facts shew that he has no cause of action, it is the duty of the judge to direct the jury to find for the defendant. I am also of opinion that the judge misdirected the jury. If he had left to them the question whether the plaintiff had subdemised the premises without the consent of the defendant in writing, the jury must have found for the defendant, as there was a clear breach of the agreement in that respect. My only doubt was, whether this point was open. Now the 14th section of the 13 & 14 Vict. c. 61, empowers the Court of appeal “to order a new trial on such terms as it may think fit, or order judgment to be entered for either party, *as the case may be*,” thus shewing that the *whole case* is submitted to the consideration of the Court. Then the 15th section directs the appeal to be in the form of a case, that is, each party is to make a statement; and if they do not agree on the facts, the judge is to be the arbitrator. There is, therefore, nothing in those sections confining the attention of the Court to the questions formally asked; and since, in the present case, the judge has stated how he directed the jury, we are bound to look at it, and see whether justice has been done; and as we find that the summing up is wrong, it is our duty to direct a new trial.

Verdict to be set aside and a new trial
had, the plaintiff to pay the costs to the
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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

Feb. 6.

JONES v. JOHNSON and MORGAN.

IN this case (a) a writ of error having been brought upon the judgment of the Court of Exchequer by the plaintiff

The council of the borough of Lichfield, previously to making a borough rate, made an estimate under the 5 & 6 Will. 4, c. 76, s. 92, which estimate contained (amongst others) the two following items:—"Compensation to the late town clerk, three years and a half, 105*l.* 1*s.* 10*d.*; law expenses, 800*l.*" The first of these items was, as it expressed, an award of compensation to a former town-clerk, who had been dismissed from his situation by the corporation. The second item had been included in the estimate to meet the demand of the attorney to the corporation for costs and disbursements. The attorney had paid the sum of 467*l.* to a party, to save the corporation from an execution, and this sum was one of the items included in the charges as a disbursement. At the time the estimate was made, the attorney had not delivered any signed bill of costs to the corporation. The council afterwards made a borough rate, which included the sums so mentioned in the estimate. At a meeting, which was *not a public one*, the borough council made an order, which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of the poor rates made and collected; and they also issued a warrant to their treasurer, commanding him, within 100 days *from the date thereof*, to demand from the overseers the said proportions. The treasurer issued his precept to the overseers, requiring them, within 100 days *after the receipt thereof*, to pay the proportions out of the poor rates made and collected, or to be made and collected. A warrant was issued by the defendants, one of whom was the Mayor of Lichfield, and both justices of the borough, against an overseer who had not paid the proportion assessed in his parish. This warrant contained the venue in the margin, and directed a certain sum to be levied by distress of the plaintiff's goods, and provided, that "if, within the space of five days next after such distress by you taken, the sum of &c. shall not be paid, then you do sell the said goods;" and concluded thus:—"Given under our hands and seals, and under the corporate seal of the said borough and city. T. T. (i. e.), M. B. M. (i. e.), Justices of the said borough and city; Thomas (corporation seal) Johnson, Mayor." The defendant Johnson was not stated in the body of the warrant to be mayor of the borough.

below, the case was argued (a) in the Sittings after last Michaelmas Term (Dec. 1), by

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Gray, for the plaintiff in error, who stated that he should confine his argument to the five following points (b): First, that the rate was not made in public, and was invalid. Upon this point, he cited the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 92; 55 Geo. 3, c. 51, ss. 1 & 12; 4 & 5 Will. 4, c. 48, s. 1; 7 W. 4 & 1 Vict. c. 81.

Secondly, admitting the rate to be good upon the face of it, that it was void, inasmuch as it included some *retrospective* expenses—5 & 6 Will. 4, c. 76, s. 92, *Woods v. Reed* (c), *Rex v. Justices of Kent* (d), *Rex v. Justices of Flintshire* (e), *Rex v. Chapel Wardens of Bradford* (f), and *Cortis v. Kent Waterworks Company* (g).

Thirdly, that the warrant of the treasurer to the overseers fixed a time for the payment of the rate, which time differed from that fixed by the warrant of the mayor to the treasurer, in contravention of the 55 Geo. 3, c. 51.

Fourthly, that the fifth plea in bar was bad, as it appeared therefrom that the plaintiff was out of office at the time of the distress, and overseers are not liable to have their goods seized when they are out of office (h)—55 Geo. 3, c. 51, ss. 12 & 14. And,

Fifthly, that as the 7 Will. 4 & 1 Vict. c. 81, s. 1, required the warrant to be under the hands and seals of either two justices of the peace or of the mayor, and as the war-

(a) Before *Patteson, J., Coleridge, J., Maule, J., Wightman, J., Cresswell, J., Erle, J., Williams, J., and Talfourd, J.*

(b) The substance of these objections fully appears from the judgment of the Court of Exchequer Chamber, and from the report of the case in the Court below.

(c) 2 M. & W. 777.

(d) 10 B. & C. 477.

(e) 5 B. & Ald. 761.

(f) 12 East, 556.

(g) 7 B. & C. 314.

(h) This point is omitted in the report of the case in the Court below.

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rant was signed and sealed by two justices, it was a perfect instrument before the corporate seal and signature of the mayor were attached, and therefore that both of the avowries were not proved.

Keating (with whom was *Whitmore*) appeared for the defendants in error; but he was stopped by the Court, who intimated that they would call upon him if they should find it necessary to hear any argument upon the part of the defendants.

Cur. adv. vult.

The judgment of the Court was now delivered by

PATTERSON, J.—In this case, which was argued in last Term, the first objection taken was, that the borough rate for which the distress was made was not made in public. The powers given to make such a rate is by section 92 of the 5 & 6 Will. 4, c. 76, by which it is enacted, that the council shall have all the powers “which any justices of the peace assembled at their general or quarter sessions in any county in England have within the limits of their commission, by virtue of” the stat. 55 Geo. 3, c. 51, “or as near thereto as the nature of the case will admit” &c.; “and all warrants required by the said Act to be issued

by the 5 & 6 Will. 4, c. 76, s. 92; but it is contended by the counsel for the plaintiff, that as it is a declaratory Act, it has put a construction upon the 55 Geo. 3, c. 51; and that, therefore, the reference to the latter Act in the 5 & 6 Will. 4, c. 76, s. 92, obliges the town council of any borough to make a borough rate in public. Now the town council of a borough are a representative body, but the justices of sessions are not. There is also no clause throughout the 5 & 6 Will. 4, c. 76, which requires any of the proceedings of the town council to be conducted in public; nor have they any general or open court in which they transact business. It may well be, therefore, that the legislature purposely omitted any reference to the 4 & 5 Will. 4, c. 48, in the 5 & 6 Will. 4, c. 76. But further, the words of the 92nd section are, "as near thereto as the nature of the case will admit;" and the nature of the case will not admit of the town council transacting their business publicly in open court, they not having such a court. Again, the transacting of business in open court is not a power, but rather a restriction of the powers, of the justices. There is no provision ordering the making of a borough rate by the council to be public. We have no hesitation in saying, that it is not necessary that the rate should be made in public.

The second objection is that, though the rate in question is good on the face of it, yet it is void, because the estimate of the expenses for defraying which the rate is made includes some expenses already incurred; and the case of *Woods v. Reed* is cited as a direct authority on this point. The 92nd section of the 5 & 6 Will. 4, speaks of the borough fund, and in the early part of it specifies the purposes to which the borough fund shall be applied, and, amongst others, mentions the payment of various expenses incurred under the provisions of the Act. Such expenses must necessarily have been incurred before the expending of the borough funds in payment of them, therefore that part of the section clearly affords an answer to the question

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now before us. The section first contemplates the case of the borough fund, arising from the ordinary revenues of the borough, being more than sufficient for the purposes specified, and provides for the application of the surplus; it then contemplates the borough fund being insufficient for the purposes specified, and it provides for that case: "The council of the borough is hereby authorised and required from time to time to estimate, as correctly as may be, what amount in addition to such fund will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this Act," and to raise the amount by a rate; "and all such sums levied in pursuance of such borough rate shall be paid over to the account of the borough fund." The Court of Exchequer, in *Woods v. Reed*, construed these words "to be incurred" in reference to the time of making the rate, and by analogy to the cases of poor rates and church rates, which cannot be made retrospectively for the payment of charges or expenses, but must be prospective; and they held that an assessment by the town council for bygone expenses would vitiate a rate otherwise good on the face of it. The principle recognised in the case of church rates is, that the rate payers ought to be liable only for the expenses incurred whilst they are rate payers, and are not to be contributory to those incurred before they became so. This seems applicable to the

former town clerk, the amount of which could not be told at the time of the making of the rate, but which were still under litigation; also the expenses of various litigations which were at the time not fully ascertained, part of which was paid by the town clerk of his own accord, and out of his own funds, and would come into the estimate of the amount required to be raised. Some latitude must, we think, be allowed; and particularly in cases of litigation, the council may be justified in treating the expenses as expenses not actually incurred before the delivery of the solicitor's bill. It does not therefore clearly appear that those sums were bygone expenses. In the next place, the rate being good upon the face of it, and unpaid, the defendants, acting only as justices, and not having made either the rate or the estimate, were justified in issuing their warrant of distress; and the plaintiff cannot say the rate is bad as regards them. It is not said that the plaintiff was a person not liable to be rated, and even if the rate be wrong, he cannot raise that question in this action. This point was not taken in *Woods v. Reed*. If the plaintiff be aggrieved by the rate, he may appeal to the recorder of the borough under the 92nd section.

The third objection is, that the warrant of the treasurer to the overseers does not fix the same time as the warrant of the mayor to the treasurer, the latter being for payment within 100 days after date, and the former within 100 days after the receipt of the treasurer's warrant; and it is contended, that the 55 Geo. 3, c. 51, s. 12, requires the same time to be specified in each in a clear and positive manner; and that the treasurer's warrant is altogether void, if it does not agree in this respect with that of the mayor. This objection is shaped in two ways: first, with regard to the avowry itself; secondly, with regard to the finding in the special verdict. The avowry states in substance, that the council, to wit, on the 19th of July, made a rate, and appointed a treasurer to collect it, and ordered the over-

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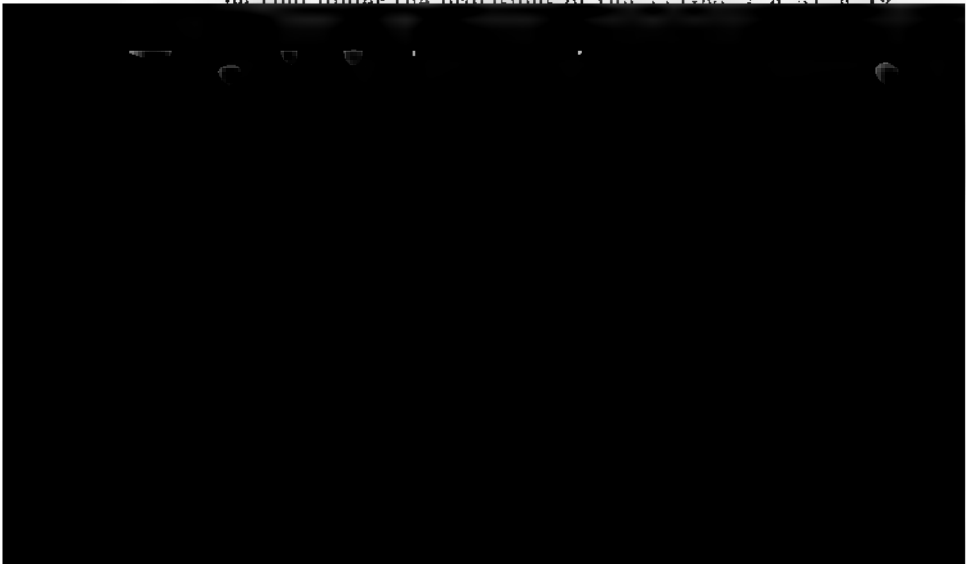
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seers to pay it out of the poor rates, but does not mention any time; and then it states, that the mayor, to wit, on the day and year last aforesaid, made a warrant to the treasurer, commanding him, within 100 days from the date thereof, to demand and collect and receive the money from the overseers; and thereupon the treasurer made his warrant to the overseers, and thereby demanded, that within 100 days next after the receipt thereof, they should pay the money; and that afterwards, to wit, on the day and year aforesaid, a copy of such warrant was left at the house of and received by the plaintiff. It is argued, that this avowry can only be supported by treating the days mentioned as material, by which it would appear that both warrants were on the same day, and that the warrant by the treasurer was received on the day of the date; so that 100 days from that date, or 100 days from the receipt, would embrace precisely the same time. If it did not, the warrant of the treasurer, according to the argument, would be void. But then, if the avowry be so construed, the finding of the special verdict, that it was received on the 29th of July, would shew that the avowry was not proved. This argument proceeds on the supposition, that the warrant of the treasurer would, if it did not correspond exactly as to the time of payment with that of the mayor, be void under the provisions of the 55 Geo. 2. c. 51. s. 12.



money be not paid within 100 days, demand having been first made; the fair meaning of which is, that the payment is to be within 100 days after demand made.

The fourth objection arises on the demurrer to the fifth plea in bar, namely, that the plaintiff, being out of office at the time of the distress, was not liable to have his goods seized. An answer was given in the course of the argument, and acquiesced in by the counsel for the plaintiff, that the distress is given for the offender's goods, and the plaintiff was the offender; and by the statute, the overseers can make a rate to reimburse him.

A fifth objection was taken (which is in truth only a question of costs), and it was contended that both avowries were not supported; for, the warrant of distress having been signed by the defendant Johnson as a justice, he could not afterwards sign it as mayor; but we are opinion that he might act in both characters, and that the warrant is not less the warrant of the mayor, because it is also that of the justice. On these grounds the judgment must be affirmed.

Judgment affirmed.

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Feb. 6.

COE v. PLATT and Another.

Held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that, under the Factory Act, 7 & 8 Vict. c. 15, s. 21, the occupier of a mill is only bound to pro-

vide a secure fence for the mill-gearing and machinery, and to keep up the fence when the parts required to be fenced are in motion for some manufacturing process. Therefore, where the declaration stated that the defendants were the occupiers of a building in which steam power was used to work machinery employed in manufacturing cotton, and in part of which building there was certain mill-gearing, being a shaft, which was worked and put in motion by the said steam power; yet the defendants disregarded their duty in this, that the shaft was not securely fenced, contrary to the form of the statute, whereby the plaintiff received great bodily injury, &c.; such declaration was held bad in arrest of judgment, for not shewing that, at the time of the accident, the machinery was in motion for some manufacturing process.

(a) See 6 Exch. 752.

(b) Before *Patterson, J., Coleridge, J., Maule, J., Wightman, J., Creswell, J., Williams, J., and Talfourd, J.*

(c) The following are the material sections referred to in the course of the argument:—

Sect. 21 enacts, "That every fly-wheel directly connected with the steam-engine or water-wheel

the parts required to be fenced are in motion by the action of the steam-engine, water-wheel, or other mechanical power, for any manufacturing process."

Sect. 42 enacts, "That notice in writing of an intention to prefer a complaint that a child or young person had been employed in a factory in which sufficient means had not been employed

IN this case, the Court of Exchequer having arrested the judgment (a), the plaintiff brought a writ of error, which was now argued (b) by

Knowles for the plaintiff (*Atherton* with him).—The judgment of the Court below was founded solely upon the language of the 21st section of the 7 & 8 Vict. c. 15 (c),

without reference to the other sections, which explain its meaning. The main object of that Act was to protect

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tion of the aforesaid machinery as a witness at the hearing of the case, he shall give notice in writing of such intention to the inspector or sub-inspector, who shall be the complainant, forty-eight hours previous to the day fixed for hearing the case."

Sect. 43 enacts, "That if an inspector or sub-inspector shall observe in a factory any part of the machinery of any kind or description, or any driving-strap or band, not securely fenced, which he shall deem likely to cause bodily injury to any person employed in such factory, he shall give notice in writing to the occupier of such factory or his agent of such part of the machinery, or such strap or band, as he shall deem to be dangerous, according to the form and directions given in Schedule (D.) to this Act annexed; and the occupier of the factory, or his agent, shall sign a duplicate copy of such notice in acknowledgment of his having received it: Provided always, that upon an application in writing made by the occupier of the factory, within fourteen days after he shall have received such notice, two arbitrators, skilled in the construction of the kind of machinery to which such notice refers, shall be appointed, one of whom shall be named by the occupier of the factory in the aforesaid application, and the other by the inspector of the district, with the

least possible delay after he shall have received such application; and the said arbitrators shall proceed to examine the machinery alleged to be dangerous, within fourteen days of the appointment of the arbitrator named by the inspector; and if the arbitrators so appointed shall not agree in opinion, the said arbitrators shall choose a third arbitrator possessing a similar knowledge of machinery; and if the said arbitrators, or any two of them, shall sign an opinion in writing addressed to the inspector of the district, that it is unnecessary or impossible to fence the machinery, or strap or band, alleged in the notice to be dangerous, the inspector of the district, on receipt of the same, shall cancel the said notice; and if the decision of the arbitrators shall be, that it is unnecessary or impossible to fence the machinery so alleged to be dangerous, the expense of such reference shall be paid as other expenses under this Act; but if the decision of the arbitrators shall be, that it is necessary and possible to fence the said machinery, then the expenses of the reference shall be paid by the occupier of the factory, and shall be recoverable as the penalties under this Act are recoverable."

Sect. 59 enacts, "That the penalty for not fencing the several parts of the machinery, hoist or teagle, and wheel-race, required

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children and young persons; though, in effecting that object, regulations are imposed which bind all persons. Even if the 21st section be read alone, the judgment of the Court below cannot be supported; but certainly not if construed in connection with other sections. The 21st section consists of two independent provisions: the first is a general enactment that all machinery "shall be securely fenced;" the second, which is in case of the mill-owner, shews under what circumstances the fencing may be removed. The omission to have the machinery securely guarded is a distinct and substantive offence, without reference to its being in motion for a manufacturing process. The ordinary rule of construction is, that the words of a statute should be so read as to give effect, if possible, to

by this Act to be fenced, shall be not less than 5*l*., and not more than 20*l*."

Sect. 60 enacts, "That if any person shall suffer any bodily injury in consequence of the occupier of a factory having neglected to fence any part of the machinery, or any hoist or tangle, or any wheel-race, required by this Act to be securely fenced, or having neglected to fence any part of the machinery, or any

much of such penalty as shall not be applied as aforesaid shall be applied as other penalties under this Act: Provided always, that the occupier of the factory shall not be liable to any such penalty, if the notice which he shall have received from an inspector or sub-inspector shall have been cancelled as hereinbefore provided, or that in any proceeding against an occupier of a factory for not securely fencing

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every part of them. It is not to be supposed that the legislature intended needlessly to repeat the same thing; but if the construction given by the Court below to the first part of this section be correct, the second part is unnecessary. If a fence is required only whilst the machinery is in motion for a manufacturing process, why enact that the protection shall not be removed whilst the parts required to be fenced are in motion for a manufacturing process? [*Coleridge, J.*—The meaning is this: as a general rule, every part of the machinery must be securely fenced; it may be necessary, at certain times, to remove the fencing; but that shall never be done while the parts are in motion for a manufacturing process.] That construction gives no effect to the latter branch of the section. It is idle to provide that the fencing shall not be removed during a particular time, if it is only to be kept up during that time. The construction contended for is supported by reference to the 42nd section, which relates to notices of complaint that machinery “has not been securely fenced,” no mention being there made as to its being in motion for any manufacturing process. The 43rd section shews more clearly the meaning of the legislature. By that section, if the inspector shall observe any part of the machinery “not securely fenced,” he is to give notice to the occupier of the factory, according to the form in Schedule (D.) That form, again, only contains a notice that the machinery is dangerous, without reference to its being in motion for a manufacturing process. The 43rd section also provides for the appointment of arbitrators to examine the machinery alleged to be dangerous. The 59th section imposes a penalty “for not fencing the several parts of the machinery, &c., required by that Act to be fenced.” Again, the 60th section, which imposes a penalty for not fencing dangerous machinery after notice, uses similar language. Under those sections, it would not be necessary for the conviction to state that the penalty was

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incurred for not fencing the machinery whilst in motion for a manufacturing process, but only that it was not securely fenced. The 64th section provides a penalty for any offence for which no specific penalty is before provided, and would therefore apply to an offence under the latter part of the 21st section, viz. the removal of the fence while the machinery was in motion for a manufacturing process; the 59th section having provided a penalty for the offence of "not fencing." [*Wightman, J.*—Suppose the fencing was removed for the purpose of cleaning or trying the machinery, would that be an offence?] If so, that fact should come by way of answer from the other side. [*Patteson, J.*—The declaration does not allege that the machinery was never securely fenced; the averment is, that whilst it was in motion by steam power it was not securely fenced.] After verdict, every intendment will be made in support of the declaration.

Hugh Hill (J. Henderson with him) for the defendants. —The declaration is not sufficient. In order to apply the correct rule of construction, the object of the statute should be regarded. The 3 & 4 Will. 4, c. 103, which is incorporated with the 7 & 8 Vict. c. 15, is intituled "An Act to regulate the labour of *children and young persons* in the mills and factories of the United Kingdom." It recites



tion enacts, that no child or young person shall be allowed to clean any part of the mill-gearing while the same is in motion, or be allowed to work between the fixed and traversing part of any self acting machine, while the latter is in motion, in neither case saying "for any manufacturing process." The term "mill-gearing" is defined by the 73rd section "to comprehend every shaft, &c., by which the motion of the first moving power is communicated to any machine appertaining to the manufacturing process." The 21st section is one entire enactment, stating that the mill-gearing shall be securely fenced, and that such fencing shall not be removed while the parts are in motion for any manufacturing process. This declaration is consistent with the fact that the mill-gearing was in motion for the purpose of examining or repairing the machine. [*Wightman*, J.—Ought not that to have come from the defendants by way of plea?] The latter part of the 21st section is not a proviso, but a portion of a substantive enactment. The statute only imposes a duty while the machinery is in motion for any manufacturing process, and no breach of that duty is shewn by this declaration. A plea, such as is suggested, would be bad as amounting to the general issue. The 20th section distinguishes between mill-gearing and machinery. The term "mill-gearing" is not mentioned in the 42nd, 43rd, 59th, or 60th sections, and the form of notice in Schedule (D.) refers to machinery only.

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Knowles replied.

PATTERSON, J.—There are many provisions in this Act of Parliament with respect to the fencing of mill-gearing and machinery; and some sections have been referred to which require inspectors to give notice that the machinery is dangerous, before any penalty is incurred. But those sections are with reference to there being no fencing whatever provided. If an inspector saw part of the machinery

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not fenced, and inquired the reason, the answer would probably be that there was a fence, but it was removed because the mill was not at work. In such a case no penalty would be incurred. Then comes the question, what is the meaning of the 21st section; and whether this declaration discloses any violation of its provisions. It has been observed, that the 20th section does not contain the words "for any manufacturing process," and therefore the legislature, in inserting those words in the 21st section, must have had a different object in view. Now, the declaration states, that the defendants were the occupiers of a building used to work machinery employed in manufacturing cotton, "in part of which building there was, before and at the time of the committing of the grievances, certain mill-gearing, being a shaft, which was then worked and put in motion by steam power," but it does not go on to say for what purpose it was in motion. The declaration then states that the plaintiff was lawfully in the mill, and that the defendants disregarded their duty in this, "that the shaft was not *then* securely fenced." The word "then" must have reference either to the time when the plaintiff was in the mill, or to the time when the accident occurred. Assuming it to mean the latter, the allegation is, that the shaft was then in motion, and not securely fenced. Then, is it necessary to add that it was in motion

all, but because, at the time when the accident happened, there was no fence to the shaft. The statute, however, only requires a fence to be kept up when the mill-gearing is in motion for a manufacturing process; and therefore the declaration ought to have shewn that, at the time of the accident, the shaft was in motion for a manufacturing process. It is argued, that the declaration may be read as alleging that no fence was ever provided; but, assuming that to be the fact, how is it material, if the defendants had the power of removing the fence when provided, and were at liberty to have it away at the time this accident happened? The question is, whether, at the time of the accident, it was the duty of the defendants to have had the shaft securely fenced. The 21st section only requires it to be so when in motion for a manufacturing process, and the declaration does not allege that it was. The allegation cannot be implied, because it is material and traversable; and the verdict does not cure the defect, for the jury could not have found for the plaintiff, unless the fact, if in issue, had been proved. The declaration is therefore insufficient, and the judgment of the Court below must be affirmed.

Judgment affirmed.

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Feb. 6, 7.

WOOD v. ADCOCK.

A., on the one part, and B. & C. on the other, mutually referred their differences to two arbitrators, who awarded de præmissis that B. should pay to one of the arbitrators a sum of money, and that he should immediately on receipt thereof pay it over to A.:—*Held*, in the Exchequer Chamber, that, if the subject-matter of the award was a separate difference, it was clearly good; and that, if it was a joint matter, the award was good as regards B., since he could not object to the omission to adjudicate on C.'s liability.

THIS was a writ of error brought by the defendant below upon the judgment of the Court of Exchequer in *Adcock v. Wood* (a).

Hayes argued (b) for the plaintiff in error.—The award is bad on two grounds: First, the submission is of joint disputes between the defendant in error of the one part, and the plaintiff in error and Sharples Adcock of the other part, whereas the award is in respect of a sole matter in difference between the defendant in error and plaintiff in error. [*Patteson*, J.—Suppose a submission of a claim by A. for money due to him from B. and C.; and an award de præmissis that B. pay A., would that award be bad?] The arbitrator ought to dispose of C.'s liability. [*Maule*, J.—Suppose A. sued B. for a joint debt due from B. and C., and there was no plea in abatement, a jury might deal with that. Or, suppose two persons indebted to a third, and, one of the former being abroad, the other agrees with the latter to refer the claim to arbitration, and there is an award that he shall pay, why is that invalid?] If two joint debtors are sued, the plaintiff cannot

referred to in the judgment of the Court below, are distinguishable. Those were cases of a submission by several persons of all matters in difference between them, which was considered as importing all matters which either party had jointly or severally against each other. Here, however, the submission is by two persons on the one side, and one on the other, of certain differences between such parties. All the statements in the declaration relate to differences of a joint character only. *Bean v. Newbury* (a) decided, that, if two persons of the one part, and one of the other part, submit disputes between them to arbitration, an award between one of those two persons and the other is void. [*Wightman*, J.—In that case the award was not de præmissis. *Williams*, J.—Where a submission is between A. on the one side, and B. and C. on the other, and the arbitrator awards that B. shall do something, is not the silence as to C. equivalent to an award that he is to do nothing?] In *Garland v. Noble* (b), the submission was similar to the present, and the arbitrator's authority was held to be confined to matters between the plaintiffs respectively of the one side, and both the defendants of the other, and therefore not to embrace differences between the plaintiffs and one of the defendants separately. [*Maule*, J., referred to *Joyce v. Haines* (c)]. That case explains the distinction relied on, for there the submission was between the parties "or any of them," and consequently included several differences. *Morden v. Hart* (d) is also an authority to shew that, where joint matters are submitted, the arbitrator must decide as to all parties.

Secondly, the award is bad, inasmuch as it directs the money to be paid to one of the arbitrators. The duty of an arbitrator is limited strictly to determining the matters referred, and he has no power to constitute himself the

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(a) 1 Lev. 139.

(c) Hard. 399.

(b) 1 Moore, 187.

(d) Sty. 471.

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banker of the parties, though he may appoint a place for payment. An award, which directs an act to be done either to or by a stranger, is void: *Moor v. Bedel* (a). *Dale v. Mottram* (b), Com. Dig. tit. "Arbitrament" (E. 7), and *Bird v. Bird* (c), only shew that an award of payment to a stranger may be good, if it appear to be for the benefit of the parties. [*Maule, J.*—Does it not so appear in this case?] It cannot be said that payment to the arbitrator is for the benefit of the party; on the contrary, it is to his detriment, for it diverts the fund from its proper channel. [*Maule, J.*—Suppose the award had stated, that the arbitrator was authorised by the party to receive the money for him, and such was the fact, would not the award be good? If so, it will be intended unless the contrary appears.] An arbitrator's power is limited by the terms of the submission, and if that does not give him authority, none will be intended aliunde. [*Maule, J.*—An arbitrator has power to determine the *mode* of payment; then may he not order money to be paid to a third person for the use of one of the parties?] *In re Mackay* (d) expressly decided, that a direction in an award, that some of the parties to the reference pay a sum of money to the arbitrator, and that he apply the same in payment of certain specified demands, is bad, although the payments appear by the tenor of the award to be for the benefit of the parties. The principle

field (a), it was taken for granted that an award of payment of a sum of money to an arbitrator was bad. [*Wightman*, J.—There it was to be kept by him.]

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The further argument having been adjourned, the Court intimated that they would in the mean time consider the case, and on the following day said that it was unnecessary to call upon

Mellor (*Macaulay* with him), who appeared for the defendant in error.

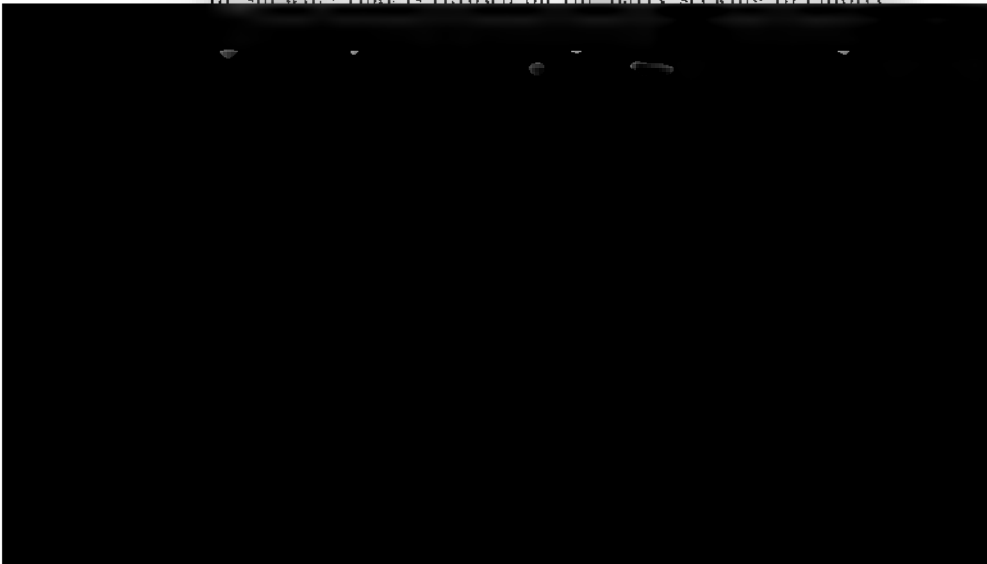
PATTERSON, J.—This was an action on an award. The declaration states, that certain disputes and differences had arisen and were pending between the plaintiff of the one part, and the defendant and one Sharples Adcock of the other part, and thereupon they mutually referred the said disputes and differences to the award of two persons, T. Sharpe and R. Inett. It then states, that the arbitrators made their award of and concerning the matters in difference so referred to them, and did thereby award and direct the defendant, that is Wood only, within a month from the date thereof, to pay to the said T. Sharpe, one of the arbitrators, 150*l.* 18*s.* 6*d.*, and did further award and direct that the said sum should be, immediately upon the receipt thereof, paid by T. Sharpe to the plaintiff; but that the defendant Wood has not paid the said sum either to Sharpe or to the plaintiff. There is a plea denying the promise, and also a plea denying that any such award was made. That, however, is not material, because the present question is, whether the judgment ought to have been arrested in the Court below upon a defect in the declaration. We think it ought not. The cases seem to have established, that a submission of differences between A. of the one part, and B. and C. of the other, will justify a decision in

(a) Cro. Jac. 577.

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respect of differences between A. and B. only, or A. and C. only. This declaration is somewhat ambiguous; it does not distinctly shew whether the difference in respect of which Wood was directed to pay a certain sum of money to the use of the plaintiff, was a separate or a joint liability. If it be taken to be a separate matter, the award would clearly be good, according to many of the authorities cited; and if it be taken to be a joint matter, the award would be good as regards the defendant Wood. As to whether it could have been objected to by Sharples Adcock, the party submitting along with the defendant, or even by the plaintiff himself, we do not give any opinion. As regards the defendant, we think that he can make no objection to the award on that ground; and therefore the first objection fails.

As to the other objection, namely, that the award directs the defendant to pay the money to one of the arbitrators, who is a stranger, to be by him paid over forthwith to the plaintiff, we think that fails also. There is a distinction between an award which directs a thing to be done *by* a stranger, and one which directs a thing to be done *to* a stranger; and the rule is, that an award directing a party to pay money to a stranger is not good, unless it be for the benefit of one of the parties to the submission, and the onus of shewing that is thrown on the party seeking to enforce



Still it is said that such an adoption is not sufficient, and that it ought to appear that the award was good at the time it was made; but the case of *Snook v. Hellyer* is a direct authority that the award is good, although the agency is not shewn. On the other hand, the case of *In re Mackay* is an authority the other way; but, in the latter case, the money was to be applied by the arbitrator in various ways, and not, as here, to be paid over at once; and the party ordered to pay could not have discharged himself by paying it to the party entitled, as he clearly might in the present case; because there can be no doubt that if the defendant had paid the money to the plaintiff, that would have satisfied the award. Again, it may well be doubted whether this award does make Sharpe the agent of the plaintiff to receive the money, and whether it does not rather make him the agent of the defendant to pay it. If the latter, the defendant would have cast upon him the obligation of seeing to its proper application by Sharpe, or of paying it himself to the plaintiff. This view of the case was not discussed in argument, and does not appear to have been suggested either in *Snook v. Hellyer*, or in *In re Mackay*, and perhaps it may not be a correct view. But whether the award makes Sharpe the agent of the plaintiff or of the defendant, we think it sufficiently appears that the payment was for the benefit of the plaintiff; therefore the second objection cannot be sustained; and consequently the judgment of the Court below must be affirmed.

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Judgment affirmed.


MEMORANDA.

In Hilary Vacation, Lord *Truro* resigned the office of Lord High Chancellor of Great Britain, and was succeeded therein by Sir *Edward Burtenshaw Sugden*, Knt., who was raised to the peerage by the title of Baron *St. Leonard's*, of Slaughterham, in the county of Sussex.

Sir *A. J. E. Cockburn* and Sir *W. P. Wood* resigned their offices of Attorney-General and Solicitor-General to the Queen, and were respectively succeeded therein by Sir *Frederick Thesiger*, Knt., and Sir *Fitzroy Kelly*, Knt.

In the same Vacation, Mr. Justice *Patteson* resigned his seat on the Bench of the Court of Queen's Bench, which he had occupied since November 1830. He was afterwards sworn of her Majesty's Privy Council.

Charles Crompton, of the Inner Temple, Esq., was appointed a Judge of the Court of Queen's Bench.



Exchequer House

EASTER WEEK

Verde, Juan

THIS was an action of their receiver from the defendant under the 1 Geo. I. act. It appears that there was a person who should present a return to the House of Peers, or a person who should present a return to the House of Commons, and that the defendant should furnish the same, and that the defendant should

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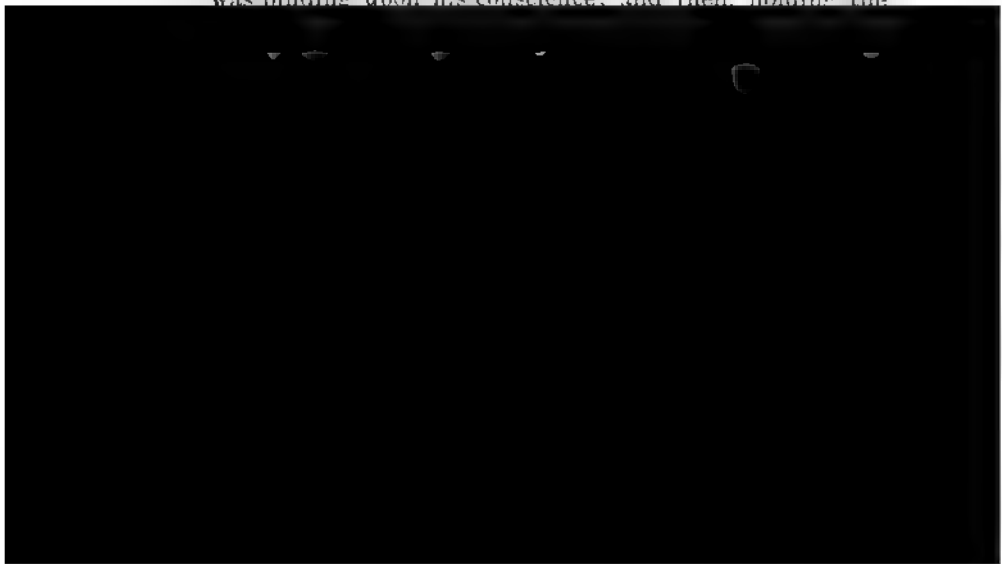
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The defendant pleaded nil debet; upon which issue was joined.

There were two other counts, alleging two other and different acts of voting on the same day, under similar circumstances. But these counts were subsequently abandoned.

On the cause coming on for trial, before *Martin, B.*, at the Middlesex Sittings after last Michaelmas Term, by the consent of the parties, and under the direction of the learned Judge, a special verdict was found, which embodied the following facts:—The defendant was returned to serve as a member in the Commons' House of Parliament for the borough of Greenwich, he being a British-born subject professing the Jewish religion. The form of oath binding on the conscience of a person of that religion was this:—after repeating the words of the oath required to be taken, he utters the words "So help me God," and then kisses the Old Testament. Such form was binding on the conscience of the defendant. On the 21st of July, 1851, after the Speaker of the House had taken the chair, and during the sitting of a full House, the defendant came to the table of the said House, and demanded to be sworn on the Old Testament; and upon his being asked his reason, he stated that it was because *that* was the mode of swearing which was binding upon his conscience; and then, holding the



The Speaker then objected, that the defendant had not taken the oath prescribed. The defendant thereupon declared to the House that the form in which he had taken the oath was the one binding on his conscience, and he then offered to subscribe the oath, omitting the words "on the true faith of a Christian," and demanded to declare to his property qualification, but was not allowed to do so.

The verdict further found, that the defendant laid on the table of the House a parchment containing the oath of abjuration as uttered by him, subscribed with his name; and concluded by stating that, unless the preceding facts shewed that the defendant had taken and subscribed the oath of abjuration, he had not done so.


The case was argued in last Hilary Term (Jan. 26 and 28) by

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Channell, Serjt., (with whom was *Macnamara*,) for the plaintiff.—The simple question is, whether the defendant had, before he voted, taken the oath of abjuration as required by law. If he had not so taken it, the plaintiff is entitled to the judgment of the Court. It can hardly be contended for the defendant, that the statutes by which the oath of abjuration is imposed are not still in force, or that Jews are exempt from taking that oath in some form. Now, assuming that Jews are bound to take the oath in some form, one question is, whether it can be taken on the Old Testament. It is submitted that this is a Christian oath, and cannot be so taken. And assuming that the oath can be sworn on the Old Testament, the next question is, whether the oath has been taken, where the words "upon the true faith of a Christian" are purposely omitted. The determination of these questions will chiefly depend upon the due consideration of the several statutes upon the subject. These statutes may be divided into two classes: first, into obligatory or imposing statutes, by which the duty of taking the oath of abjuration is imposed upon

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members of Parliament, and which include incidentally those statutes which impose that duty upon persons who are not members of Parliament; and secondly, those statutes which are of an exempting or dispensing character. These latter statutes are enacting, and not declaratory merely. Under this class will come the statutes which especially affect Jews, Quakers, and Moravians, (some of which apply to Jews only), also, the 10 Geo. 4, c. 7,—the Catholic Emancipation Act; and lastly, the 1 & 2 Vict. c. 105, intituled “An Act to remove Doubts as to the Validity of certain Oaths,” an Act, general in its character, not applying to persons of any particular creed or sect, but which enacts that all persons shall be bound by an oath administered to them in the form binding on their conscience, without respect to *any* religion or sect whatever. It may be admitted, that such matters as are *strictly* confined to the consideration of the oaths of supremacy and allegiance are not decisive of the present question; yet, inasmuch as these oaths are required to be taken in conjunction with the oath of abjuration, the consideration of their character may assist in throwing some light upon the inquiry. The first statute on the subject is the 1 Eliz. c. 1, intituled “An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all Foreign Powers repugnant to the same.”

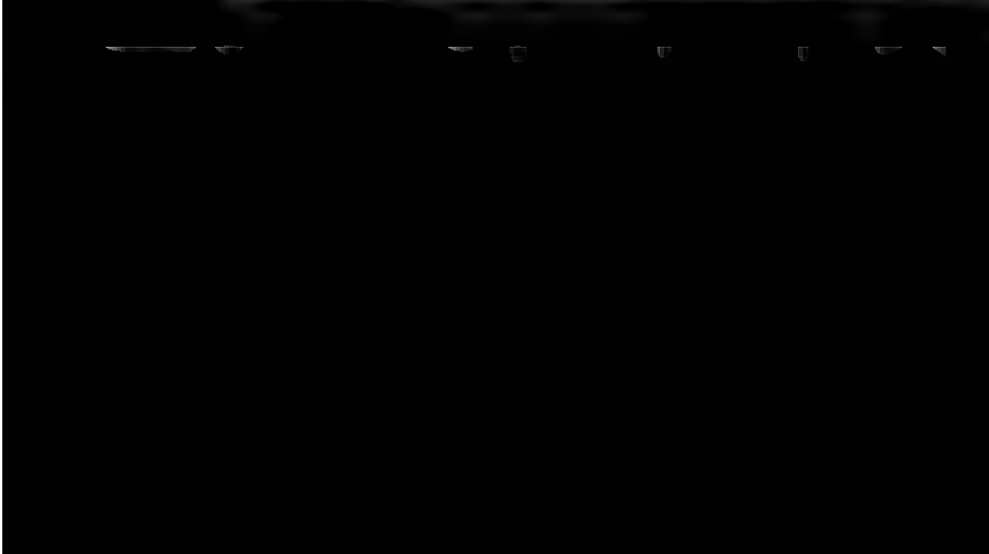


last-mentioned oath to other classes of persons. The 5th section required it to be a corporal oath to be taken *on the Evangelists*, and *verbatim*. The 16th section imposed the duty on every member of Parliament of taking this oath before he should enter the Parliament House or should have any voice there, subject to the same penalties in case of disobedience as if he had never been elected. It is clear that a member of the House could have taken this oath on the New Testament only, and as a Christian oath. Next came the 3 Jac. 1, c. 4, intitled "An Act for the better Discovering and Repressing of Popish Recusants," which has been said to contain the germ of the oath of abjuration. The form of the oath there given has been described in succeeding statutes as the "oath of allegiance and obedience." The 13th section enacts, that, for the better trial how his Majesty's subjects stand affected in point of their loyalty and due obedience, it shall be lawful for any bishop in his diocese, or two justices of the peace, to require all persons of the age of eighteen,—with certain exceptions there mentioned,—confessing or not denying their recusancy, to take the oaths thereafter following "upon the Holy Evangelists." Section 15 gave the form of the oath, which concludes with the following words, which are similar to those used in the present oath:—"And all these things I do plainly and sincerely acknowledge and swear according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation or mental evasion, or secret reservation whatsoever. And I do make this recognition and acknowledgment heartily, willingly, and truly, *upon the true faith of a Christian*. So help me God." This oath, which answers to the present oath of abjuration, could be taken on the Evangelists only, that is, on the New Testament. At the period when that Act was passed, it was the policy of the legislature to exclude all but Christians from hold-

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ing any office of importance; whether this policy was wise or unwise is not now the question; and although, perhaps, Jews were not contemplated by the legislature as a class of persons likely to hold seats in the House, yet the words of this Act are sufficiently extensive to exclude them altogether from the House. By this Act of 3 Jac. 1, c. 4, members of Parliament were not expressly affected; but the 7 Jac. 1, c. 6, s. 2, after containing a recital "to shew how greatly his Majesty's loyal subjects approve the said oath, they prostrate themselves at his Majesty's feet, beseeching him that it may be administered to all his subjects," proceeded to enact, that all persons above eighteen should take the oath upon the Evangelists. And by the 8th section, members of Parliament were expressly required to take the oath before entering the House. Then came the 30 Car. 2, st. 2, c. 1, intitled "An Act for the more effectual preserving the King's person, and for disabling Papists from sitting in either House of Parliament." This Act did not effect any alteration in the oath of supremacy as it was settled by the Act of Elizabeth, neither did it affect the oath of allegiance and obedience of Jac. I., but it superadded the necessity of signing a declaration against the doctrine of transubstantiation. Section 2 enacted that no member of the House of Commons should sit during any debate, or vote, until he should have first taken the oath.



ject of a Christian doctrine, as the *test* of that person's belief in Christianity, who took these oaths and subscribed this declaration. If this was meant as a test of Christianity, *expressly* imposed by statute, then it will become necessary for the defendant to shew that these statutes have been repealed. If the legislature had been silent upon this subject after these enactments, the question would have been free from doubt. But then the 1 W. & M. c. 1, was passed, which remained in force, for some purposes at least, to the 1 & 2 Will. 4, c. 9. The 1 W. & M. c. 1, repealed the Acts imposing the old oaths of allegiance and supremacy on members of Parliament, and substituted new oaths in their place; and it enacted, that the taking of the *new* oaths and the repeating of the declaration against transubstantiation, required by the 30 Car. 2, st. 2, c. 1, in such manner as the taking the said oaths and repeating the said declaration was required by that Act, should be good and effectual to all intents and purposes, as if the old oaths had been taken; and it further enacted, that the new oaths should be taken under the same penalties as the old; and that members of Parliament should take the new oaths within the same time, and in the same manner and form, as they were required to take the old, and not in any other manner. The 6th section, which gave the form of oath, did not contain the words "on the true faith of a Christian," but concluded simply with the words "So help me God." This statute required the oath to be taken in the same manner as was the former oath. The oath, therefore, was required to be taken on the Evangelists—that is, on the New Testament; and the declaration against transubstantiation must also have been subscribed at the same time. This Act applied to members of Parliament. Then came the 1 W. & M. c. 8, intituled "An Act for abrogating the Oaths of Supremacy and Allegiance, and appointing other Oaths;" which, after reciting the 5 Eliz. c. 1, and 3 Jac. 1, c. 4, enacted that no person should be

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obliged to take the said oaths under either of those statutes. This Act has been supposed to have in effect abrogated those oaths; but that could not have been so, for, in respect of taking them before the Lord Steward, it was in force until the 1 & 2 Will. 4, c. 9, as appears from the enactments of the latter statute. By section 3, new forms of oaths were authorised to be taken by all persons who were required to take the former oaths. Section 5 imposed the same penalties as were imposed upon failure to take the old oaths. This Act did not in any way interfere with the declaration against the doctrine of transubstantiation. The form of oath given by it did not contain the words "on the true faith of a Christian." Next came the 13 Will. 3, c. 6, by which, for the first time, was imposed the oath of abjuration, and in the form in which it is still to be taken. The only modifications that form has undergone, down to the 6 Geo. 3, c. 53, are those which were necessarily made to meet such of the limitations contained in the two Acts of Settlement, with respect to the succession of the Crown, as were then capable of taking effect. By the 6 Geo. 3, c. 53, another alteration was made in the form, in consequence of the death of the Pretender. The 13 Will. 3, c. 6, intitled "An Act for the further Security of his Majesty's Person and the Succession of the Crown in the Protestant Line, and for extinguishing the Hopes of the pretended Prince of Wales and all other


tion, members of Parliament were required, before voting or sitting in the House, to take and subscribe this oath in manner following—"that is, between nine in the morning and four in the afternoon, at the table in the middle of the House, whilst a full House of Commons is there duly sitting, with their Speaker in his chair." By section 11, any member sitting or voting, not having taken this oath, was to be deemed a Popish recusant convict, and was to suffer as such, and to be disabled from holding any place, or from serving the Crown in any capacity whatever, or from sitting in the House, from being a guardian or executor, or from taking any legacy, or from suing or being sued, and was subject, in addition, to the forfeiture of 500*l.* for each offence. Then came the 1 Anne, st. 1, c. 22, which gave a similar form of oath, with a like conclusion, substituting the name of Anne for that of William. The next statute was the 6 Anne, c. 7, which by the 20th section provided a form of oath to be taken from and after the demise of her then Majesty, in which form blanks were left for the name of the Sovereign, whoever that might be, it being at that time uncertain whether the Queen might have issue, or whether the Electress of Hanover, or her son, (afterwards George I.) would succeed; and it expressly enacted that such blanks should be filled up with the name of her or him as Queen or King who should be next in succession, &c. The 1 Geo. 1, st. 2, c. 13, the title of which is similar to that of the 13 Will. 3, c. 6, after reciting that Act, the Act of Settlement, and several others, carried out the alterations contemplated by the last statute of Anne, (the Electress having died shortly before Queen Anne); and by it a form was given, filling up the blanks left in the form of the Act of Anne with the name of George. In this Act the oaths of *allegiance*, *supremacy*, and *abjuration* are all fully set out, and directed to be taken by various classes of persons therein mentioned. The 16th and 17th sections required the oath thus altered to be taken by members of Par-

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liament; and the latter section inflicted the penalty of 500*l.* on any member who should presume to vote, not having taken that oath. There is no real alteration of the oath in the form prescribed by this Act; for it was to be taken in such manner, and together with such other oaths and declaration against transubstantiation, as the former oaths. Then came the 6 Geo. 3, c. 53, which was passed in 1766 (the Pretender having died in 1765). By this Act a form of oath, altered, in consequence of the death of the Pretender, so as to apply to his descendants, is set out as required to be taken by all persons who by the previous Act of 1 Geo. 1, st. 2, c. 13, and 5 Geo. 1, c. 29, were required to take the oath of abjuration. This is the *form* in which the defendant was required to take the oath; but the penalties are recoverable under the 1 Geo. 1, c. 13, which is specially referred to and imported into this Act as to the manner, &c. of taking the said oath. These statutes all come under the head of obligatory statutes.

Secondly, with regard to exempting statutes. The first division of these statutes embraces those which are applicable to Jews. Some of these statutes apply to Quakers equally with Jews, but these may be included in the first division. These are not all to be found in the ordinary editions of the statutes. The first of them is the 9 Geo. 1, c. 24 (1722). This and the 10 Geo. 1, c. 4, are important in two views of



quired to do under certain other Acts, or to forfeit the fee simple of his estate. The next statute of this class is the 10 Geo. 1, c. 4. This Act will no doubt be much relied upon by the defendant, as creating an exemption in his favour. After reciting the 9 Geo. 1, c. 24, and that the greater part of the persons thereby affected had taken the oath, but that, by reason of the shortness of the time allowed, they had not all been able to do so, and that it was necessary to extend the time, the Act made certain exemptions in favour of women, reversioners, and others, and of persons who had previously taken the oaths in either House of Parliament, or in any Court, &c. The Act then proceeded to extend the time for taking the oath or registering; and also provided for the exemption of persons under mental or bodily disabilities, or beyond the seas, giving them further time till the expiration of six months after their return, or after the removal of such disability; it then substituted the forfeiture of one year's value for that of the fee simple provided by the 9 Geo. 1, c. 24. Then followed certain provisions as to Quakers, relieving them on making a declaration to the *effect* of the abjuration oath in the form prescribed by the 8 Geo. 1, c. 6, and the Act then proceeded as follows:—"And whereas the following words are contained in the latter part of the oath of abjuration—viz. 'upon the true faith of a Christian;' be it further enacted, that whenever any of his Majesty's subjects professing the Jewish religion shall present himself to take the said oath of abjuration, in pursuance of the said recited Act or of this present Act, the said words '*upon the true faith of a Christian*' shall be omitted out of the said oath in administering the same to such person, and the taking the said oath by such person professing the Jewish religion without the words aforesaid, in like manner as Jews are admitted to be sworn to give evidence in courts of justice, shall be deemed to be a sufficient taking of the abjuration oath within the meaning of this Act and the said recited

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Act (a)." The only effect of this enactment was to allow Jews to omit these words when taking the oath for the purpose of the 9 Geo. 1, c. 24, *but for this purpose only*. It did not recite the 1 Geo. 1, st. 2, c. 13. It gave no indemnity for other purposes, and thus does not come up to the exemption which will be contended for on behalf of the defendant. The next statute is the 13 Geo. 2, c. 7, an Act for naturalising foreign Protestants and others therein mentioned, who should settle in the North American colonies, and reside there for seven years without being absent more than two months; for which purpose they were required to take the oath of abjuration. After providing for the case of Quakers, who were to make a declaration under the 8 Geo. 1, c. 6, it enacted, that when any person of the Jewish religion should present himself to take the oath, he might omit the words "on the true faith of a Christian." This exemption was clearly limited to the *special* purpose of the Act, and in fact, by shewing the necessity in this case of a special exception, proves the general rule that the oath is a *Christian* oath. These are all the important Acts which have a particular relation to *Jews*. The course the legislature adopted with regard to Quakers shews how carefully they proceeded in passing enactments for the relief of that class of subjects. As to

Will. 3, c. 34, gave power to take the affirmations of Quakers instead of oaths, except in criminal cases, in all courts of justice. This, however, was only a temporary Act. The 1 Geo. 1, st. 2, c. 6, gave further indemnities to Quakers, and gave to their declaration the effect of the abjuration oath, and made perpetual the 7 & 8 Will. 3, c. 34, and appointed a form of affirmation. The 8 Geo. 1, c. 6, carried the relief further, by omitting the words "in presence of Almighty God," which had been objected to in the former Act, as being a form of adjuration. The 22 Geo. 2, c. 46, clearly shewing that doubts then existed whether an affirmation instead of an oath, in cases where an oath was required *by statute*, was admissible, except where expressly declared to be so by statute, enacted that a Quaker's affirmation should be admissible in all cases. In these statutes, the words of the affirmation were given, omitting the words "on the true faith of a Christian." The 9 Geo. 4, c. 32, made their affirmation admissible in criminal cases. In 1833 the 3 & 4 Will. 4, c. 49, was passed, whereby Quakers and Moravians were allowed to make affirmation in all cases whatever where an oath was required.

These statutes, which have reference to Quakers, distinctly and pointedly shew with what caution the law has been altered to obviate their scruples. But these alterations have been made by the express provision of the legislature, and no such alterations have been made to affect the Jews. The form of declaration provided by the 3 & 4 Will. 4, c. 49, shews on the face of it that the party making the declaration is a Quaker. The Catholic Emancipation Act, 10 Geo. 4, c. 7, repeals the obligation of taking the oath of abjuration, and the declaration against transubstantiation, but so far only as Roman Catholics are concerned; and it gives a form of oath to be taken by members of Parliament instead of the oaths of allegiance, supremacy, and abjuration, and provides for the alteration of the name of the Sovereign under the limitations

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in the Act of Settlement. Here, too, the relief is *expressly* given. The last statute, and the one on which the defendant must mainly rely, is the 1 & 2 Vict. c. 105, intitled "An Act to remove Doubts as to the Validity of certain Oaths." This is no doubt a declaratory, but it is also an *affirmative* statute; and the principle of law is clear, that an affirmative statute cannot repeal previous affirmative statutes, unless it either do so *expressly*, or is so far inconsistent with the preceding statutes as to repeal them by *necessary* implication. It must be contended for the defendant that this is a repealing statute; for it will not support his position, unless it repeals the oath of abjuration, both as to the words and as to the manner of taking it. It may be admitted, that where no *form* of oath is prescribed, a person may take an oath in that manner and form which are binding on his conscience: *Omichund v. Barker* (a). But the oath which the defendant was required to take is a Christian oath, is prescribed by the legislature, and must be taken in the particular form and manner prescribed, which can only be dispensed with by the same authority. In *Omichund v. Barker* it was decided, that any person might be sworn as a witness in a court of justice according to the custom and manner of his religion. But in such case no particular form of oath is necessary. That authority, therefore, does not touch the

or a deponent in any proceeding, civil or criminal, in any Court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form, and with the ceremonies, most commonly adopted." Now this Act contains no reference whatever to the oath of abjuration, nor to any prior Act of Parliament, which would undoubtedly have been recited, if intended to be thereby repealed. This Act seems to apply *exclusively* to oaths administered in Courts of law. There are cases in which oaths are required to be taken in Courts of law on appointments to offices, and therefore the operation of the Act is not necessarily confined to the cases of jurymen or witnesses. Effect may be given to every word of this Act, without having recourse to the assertion that it amounts to a repeal of former statutes.

It cannot be contended that there is anything in the Acts which enables the defendant to take the oath of abjuration on the *Old Testament*, nor can it be contended with any success that the words "on the true faith of a Christian" are not *of the essence* of the oath, and therefore that they can properly be omitted. It may be said that these statutes were levelled against Papists, and such may be admitted to be the case; but the language of the 6 Geo. 3, c. 53, is large enough to include all who claim to sit and vote as members of the House of Commons. There can be no doubt that it was the intention of the legislature, in this Act, to impose a religious test; and the greatest care has been taken so to frame the oath as to render it binding upon the conscience of the person who takes it.

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There may well be Christianity without Protestantism, but there can be no Protestantism without Christianity. The words "on the true faith of a Christian," coming as they do after the stringent language at the commencement of the oath, shew that they are of the *essence* of the oath, and cannot be rejected, and at all events that the legislature meant those words to be a declaration accompanying and explaining the oath, and therefore to be *obligatory* and *necessary*. Whether the Jews were in the contemplation of the legislature or not, *at the time* when the oath was made compulsory, is a matter with which it is unnecessary to encumber the argument. It is sufficient to know, that at that period all persons were excluded from public honours and emoluments unless they were Christians. The spirit of the legislative enactments of that period must be referred to, to shew the intention of the legislature. Even to as late a time as the repeal of the Test and Corporation Acts, no one could hold certain important offices without having received the sacrament within a prescribed period. It is incumbent on the defendant to shew that the statutes which *prima facie* affect Jews have been repealed, and that not merely for *general* but for Parliamentary purposes, as has been *expressly* done in the case of Catholics and Quakers.

Lastly, it is said that the plaintiff is now suing under the



the obligation to register their real property, and for that purpose only. The 1 & 2 Will. 4, c. 9, repealed so much of certain Acts as required certain oaths to be taken by members of the House of Commons before the Lord Steward or his deputies. Up to that time, therefore, the oaths to be thus taken had not been abrogated by the Acts requiring oaths to be taken before the Speaker. These Acts are cumulative. There was not, consequently, (as has been supposed to be the case), a period, from the 1st to the 13th of William III., when the oaths before the Speaker did not contain the words "on the true faith of a Christian," during which period these words had not to be taken by members of Parliament. Upon these grounds, it is confidently submitted that the plaintiff is entitled to the judgment of the Court.

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Sir *F. Kelly* (with whom were *Willes* and *A. Goldsmid*) contra.—The question no doubt depends upon the true construction of the several statutes upon the subject. But as these Acts are highly penal, they must be *strictly* construed. The Acts of Parliament in the present case, if still in force, impose upon all classes of her Majesty's subjects, eligible to serve in Parliament, the obligation and necessity to take certain oaths, under very heavy and fearful penalties.

That Jews are entitled to serve in Parliament is a proposition which cannot admit of a doubt; and though the Acts may be construed in such a sense as to impose upon this class of the community, and perhaps on other classes also, the duty of taking an oath repugnant to their consciences, under pain of losing some of the most valued privileges of a British subject, the Court is bound to construe the words of the statutes so as to give to them, if possible, such a construction as will favour liberty of conscience. It must be remembered, that the refusal to take the oath in question does not expose a Jew merely to the loss of 500*l.*, in the shape of a penalty, but to a disqualifi-

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cation to sue or to be sued, to be an executor, to be a guardian of any child, to hold any office, or to give any vote in the election of members of Parliament, and indeed to other most fearful penalties.—It is submitted that the defendant is entitled to the judgment of the Court, on the following four distinct grounds:—

First, the 6 Geo. 3, c. 53, is no longer in force; it ceased to be so on the death of George III., or at all events on the death of the last Sovereign bearing the name of George. That being so, there was no power in the House of Commons, or in any officer of that House, or in any Court of law, or in any officer of a Court of law, to take upon himself to alter the terms of an oath, the *whole* form and language of which has been *expressly* given in an Act of Parliament by the legislature; and in such case the oath containing the name of “our Sovereign Lord King George,” that being the form of language in the Act, is the only oath which could lawfully be administered under it. Upon every occasion when a change of the name of the Sovereign has been considered necessary, the legislature has interposed by *express* enactment, reciting such necessity, and expressly authorising the substitution of the name of one Sovereign for the other. That course has been pursued from the time of William III. to that of George III.; and as there is no Act of Parliament which has since con-

the defendant, to take the oath in such form as was binding on his conscience. Here the defendant has declared that the taking the oath with the omission of the words "upon the true faith of a Christian," is binding upon his conscience. If there be any exception or qualification to this rule, it is in the case where an oath is imposed by way of a religious or political test; but that can only be the case where the language and intention of the particular Act clearly and positively require such a construction.

Thirdly, assuming these propositions to be doubtful, the defendant was bound and authorised to take the oath which he did take; for this arises by necessary implication from the 1 & 2 Vict. c. 105.

Fourthly, the 10 Geo. 1, c. 4, has been kept alive and in force by a succession of Acts continuing or enlarging the time given for taking the oaths, and, with respect to Jews, without the words "upon the true faith of a Christian," until November 24, 1766, and consequently beyond the time when the Act 6 Geo. 3, c. 53, was passed, and thus, by its existence at that time, qualified the meaning of the provisions of that Act.

With reference to the first branch of this argument, it is submitted, that each successive Act of Parliament applying to the oath of abjuration, beginning with the Act of Will. 3, and ending with the statute 6 Geo. 3, c. 53, provided, and was intended only to provide, for the particular state of things in existence at the time when those Acts were passed. No legislative provision has been made on the subject since the latter Act, and therefore it cannot be so far altered as to give effect to the imposition of the oath under the present change of circumstances. The title as well as the terms of this Act shew that it was intended for temporary purposes only, and was absolutely necessary to authorise certain alterations rendered expedient by political changes. In 2 Inst. 479, it is laid down, that a new oath cannot be imposed on the subject without

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the authority of Parliament; but the giving of every oath must be warranted by the common law, or by an Act of Parliament. This has always been admitted to be the law, and was acted upon in *Omichund v. Barker* (a). Neither the House of Commons, nor the Speaker, had any authority to substitute the name of Queen Victoria for that of King George. If the House of Commons had such power where no dispute as to right of succession would be likely to arise, it follows that even in the case of a disputed succession, as in the case of the birth of twins, of Albert and Edward for instance, they might as well presume to insert the name of Albert or Edward, and so to wound the consciences of many persons who might entertain an opinion at variance with that of the House of Commons as to the title of the reigning monarch. But neither the House of Commons nor the Speaker, nor any other authority than the legislature, have power to alter the form of an oath, or to insert a form differing as to its *essence* and *substance* from that oath which has been framed by the authority of Parliament. The several Acts upon this subject fortify this view, and shew that they were passed for a temporary purpose only. The Acts which give the abjuration oath, nearly in its present form, 1 Anne, st. 1, c. 22, 4 & 5 Anne, c. 8, and the 6 Anne, c. 7, are clearly of a temporary character, and were intend-

accession of Geo. I., the blank was filled up with his name. Then came the 1 Geo. 1, c. 13; and afterwards, on the death of the Pretender in 1765, the 6 Geo. 3, c. 53, was passed to substitute his "descendants." This Act further referred to all the clauses in the 1 Geo. 1, c. 13, which it incorporated. [*Pollock, C. B.*—We cannot shut our eyes to the fact, that, during the reign of Geo. IV., the oath of abjuration was taken by a great number of individuals in the form prescribed by the Act of Geo. III. Either that was a farce, or the words of the oath must be taken to relate to the Sovereign as a corporation sole. There may be some ground for contending that the operation of the 6 Geo. 3, c. 53, ceased at *his* death; but it seems to me that the argument is of no weight, that the Act applies to the *name*, not to the *person* of the Sovereign.] It is sufficient for the present purpose to contend, that the operation of that Act ceased with the reign in which it was passed. During the reign of George III., the claims of the Pretender and his family had become a mere dream, and there had been nothing to call the attention of the legislature to the subject. The next Act of Parliament to which reference may be here made, is of the same character nearly as that already referred to. This statute is of the greater importance, inasmuch as it has been passed in more recent times. It is the Roman Catholic Relief Act, 10 Geo. 4, c. 7, the second section of which, although the form of oath there given is a special form for Roman Catholics, refers to King George IV. in the same terms as King George III. was referred to in the oath of abjuration. But the language of that Act does not by implication give any power to the House of Commons or to the Speaker, upon the death of George the Fourth, to substitute the name of William or Victoria. It may be, not that they had not the power, but that the oath was one personal to the reigning Sovereign; for the third section, which immediately follows, enacts further, "that,

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wherever in the oath hereby appointed and set forth the name of his present Majesty is expressed or referred to, the name of the Sovereign of this kingdom for the time being, by virtue of the Act for the further limitation of the Crown and better securing the rights and liberties of the subject, shall be substituted from time to time, with proper words of reference thereto." The doctrine, as laid down in the 2nd Inst. 479, and acted upon in *Omichund v. Barker*, is applicable to the present case. [*Alderson, B.*—In that case Lord Chief Justice *Willes* observes, that what Lord Coke says in the 2 Inst. 479, and 3 Inst. 165, that an oath cannot be altered, nor a new one imposed but by authority of Parliament, plainly relates only to promissory oaths or oaths of office, viz. as to those of Privy Councillors, Judges, Sheriffs, and the like, and in no degree to oaths taken by witnesses.] Lord Chief Justice *Willes* does appear to be of that opinion, but it is difficult to see the soundness of such a distinction, for an authority is scarcely required to shew that the terms of a particular oath imposed by the legislature or by the common law cannot be altered, either by the authority of the party administering, or by the party taking the oath, but by the legislature only. But even if that distinction be sound, it does not detract from the force of the defendant's argument. When an oath is directed to be taken with respect to the reigning Sovereign in his cor-

tion, and no part of the thing sworn to under the statute. It may be a question worthy of consideration, whether the long habit and practice, in the Houses of Parliament and elsewhere, of administering the oath in the accustomed form, has not led to some inadvertence in the adoption of the particular terms of the Act of Parliament.

The second proposition is, that under the 6 Geo. 3, c. 53, upon which this action is founded, and which rendered necessary the taking of the oath (if by law it must be taken at all), that oath is to be taken by a *Jew* with the omission of the words “on the true faith of a Christian.” This point depends solely upon the determination of the question, whether the provisions of the 10 Geo. 1, c. 4, remained in force at the time of the passing of the 6 Geo. 3, c. 53. It has been said that this Act had then expired; but a series of enactments may be cited, to shew that it continued in force beyond the period when the 6 Geo. 3, c. 53, was passed. The last-mentioned statute, after enacting that, from and after the 4th day of June, 1766, the oath shall be taken in the form and manner thereafter set down by all classes of his Majesty’s subjects, proceeded to provide, that all persons required to administer or to take the oath of abjuration, should administer and take it according to the form therein set down and prescribed, in such Courts, and within the time limited, and in such manner, with due observance of the same requisites, *and with benefit of the same savings, provisoes, and indemnities, as were by any Acts or parts of Acts then subsisting directed and enacted.* If, then, this Act came into operation at a time when the 10 Geo. 1, c. 4, was still in force, it must not be forgotten that the latter Act provided that the oath of abjuration should be taken by Jews, omitting the words “on the true faith of a Christian;” and that thus the 6 Geo. 3, c. 53, would provide, that the oath of abjuration under that Act also was to be taken by Jews with the omission of the words “on

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the true faith of a Christian." If the plaintiff's argument be adopted, no due effect is given to the words "the same savings, provisoes, and indemnities." The 9 Geo. 1, c. 24, referred to the 1 Geo. 1, st. 2, c. 13, and defined the time within which the oath of abjuration under that Act was to be taken by all persons above eighteen, or in default they were to register their real estate. Further time was given by the 10 Geo. 1, c. 4, which, after reciting the 9 Geo. 1, c. 24, and that, though most persons had taken the oath, yet many had been prevented by shortness of time, provided, that the Act should not extend to women &c., nor to persons who had taken the oath in either House of Parliament under the 1 Geo. 1. Then came the provision in the 17th section, that the oath should be taken by the *Jews* without the words "*on the true faith of a Christian*." This oath continued to be referred to, as to be taken within various periods set forth in various other Acts of Parliament (ten to fifteen in number), until the 6 Geo. 3, c. 7, was reached; which still continuing the oath in the same form, and subject to the same provisions, extended the time for taking it to the 24th of November, 1766, the time originally appointed for that purpose being the 25th of December, 1723. This was a legislative declaration that the words "on the true faith of a Christian" were not a necessary or essential part of the oath of abjuration. That oath consists of many

on any person as a test of Christianity. The Act was levelled solely against Papists, and against persons favouring the Pretender; and it was not intended to do more than to require the person taking it to pledge his conscience to the several matters before mentioned. If it had been intended as a test of Christianity, it was impossible that the legislature could in any case have authorised, as they did authorise in *express terms*, a Jew to take the oath. The first of the statutes which succeeded the 10 Geo. 1, c. 4, and which kept that Act alive beyond the time of the 6 Geo. 3, c. 53, was the 2 Geo. 2, c. 31; but it will not be necessary to trouble the Court with all these Acts (a). The last of them was the 6 Geo. 3, c. 7. That statute recited, that many persons who ought to have taken, on qualifying for office or employment, *or for any other cause or occasion*, the oaths required by the 1 Geo. 1, c. 13, had, in ignorance of the law, or from absence or some other unavoidable accident, omitted to take the oaths to qualify themselves within the time and in the manner required by former Acts of Parliament, whereby they might be in danger of certain penalties; and it then proceeded to enact, that all such persons who should take the oath before the 28th of November, 1766, at the place and in the manner, &c. provided by 1 Geo. 1, c. 13, or by any other Act or Acts, should be indemnified. That Act, therefore, extended the time beyond the passing of the 6 Geo. 3, c. 53; so that if any person professing the Jewish religion when that Act was passed, had failed to take the oath of abjuration within the time required by law, he would have had until the 28th of November, 1766, to take the oath; and under the clause of the 6 Geo. 3, c. 53, by which the oath was to be taken with all such *savings* and indemnities as by any subsisting Act or any part thereof were provided, any

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(a) A list of these Acts was handed up to the Court, and they are referred to by *Parke, B.*, in his judgment, post, pp. 555-6.

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person professing the Jewish religion would have been authorised, under the 17th section of the 10 Geo. 1, c. 4, to take the oath, omitting the words "on the true faith of a Christian." If the Court should hold that the word "saving" in the 6 Geo. 3, c. 7, does not apply to the 17th section of 10 Geo. 1, c. 4, it will in effect decide that a class of persons are compelled, under the severest penalties, to take an oath in a manner involving both blasphemy and perjury; and if such a result can be avoided, the Court is bound so to construe the words. When the law imposes on all the subjects of the realm the duty and necessity of taking an oath, the important question arises, whether the law does not also require that the oath shall be taken in such form and manner as to bind, not to offend, the conscience of the swearer. It is submitted that, whenever the law imposes on a subject the duty of taking an oath, it not only *permits* but *requires* the oath to be taken in such a manner as to be binding upon the deponent's conscience. Now, if it be satisfactorily shewn that there are cases in which a Jew has no choice, but is bound and compelled to take the oath of abjuration under severe and heavy penalties, the question will stand on those general principles, which are good for all laws and for all times. The 1 Geo. 1, c. 13, had no religious aspect at all. It was passed, as its title declares, to secure the person and property

office; but when he has been elected a member of the House of Commons, he becomes liable to all the duties and obligations imposed upon members. He cannot repudiate the election, even though it has been made without his assent and against his will. If a call of the House takes place, or any other act is required to be done under the authority of that House, such as the attendance on a committee, the party called upon is bound to obey the order, and in case of disobedience is subject to be committed for contempt. [*Pollock*, C. B.—A person is not a member of the House till he has taken his seat.] It is submitted that he is a member before, otherwise he could not be entitled to vote for the Speaker, which he may do. [*Pollock*, C. B.—There is nothing of which I am aware to prevent a minor, or a woman, or even an alien enemy, from doing so.] Such persons could not be members, because their election would be void; but in the case of a person who is eligible (as a Jew undoubtedly is), when actually elected, such person is as much a member of Parliament before he is sworn as he is afterwards. Taking the oath is simply a statutory obligation, and imposed on the party as a condition precedent to his right to vote, which does not effect the slightest change in his status as a member. In *Dwarris on Statutes*, 179, a precedent is cited, by which it appears that, on the 13th of April, 1715, the House of Commons determined that Sir Joseph Jekyll was a person fit to act on a Committee of Secresy, though he had not been sworn at the clerk's table. [*Pollock*, C. B.—The question is, whether a party returned as a member is bound to attend committees, and is liable to the jurisdiction of the House, before he has taken his seat.] It is submitted that he is. The question is simply whether the party is eligible, and if he be so, the moment the writ is returned he is to all intents and purposes a member. The House of Commons was in possession of all its undoubted rights and privileges for

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ages before any of these Acts were passed. At common law, a person when elected had all the rights of a member of the House; but the statute said that he should not sit in the House during a debate, nor vote, unless he had taken certain oaths. With all the privileges and with all the liabilities attached to that character—by the terms of the Act, the member is not to sit, but the penalty is for voting. But in every other respect he is a member. The 10th and 11th sections of the 1 Geo. 1, c. 13, are so plain in their language and meaning, that it is impossible to escape the perpetration of monstrous injustice, if a different construction be adopted from that for which the defendant contends. The 10th section enacted, that two justices of the peace, or any one else specially appointed by the Crown, might administer the oath of abjuration to any person whom they suspected to be dangerous or disaffected to his Majesty; and if such person refused to take the oath, his refusal was to be certified to the Court of Quarter Sessions, and then recorded; and from that time forth he was to be held as a *Popish recusant convict*, and should as such forfeit and be proceeded against. The 11th section went further, for, after containing a clause "*to the intent and purpose that no person might avoid taking the said oaths,*" it proceeded to empower two or more justices of the peace at their pleasure at the next ensuing General Quarter



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of that nature, it may be freely admitted that the intention of the legislature must be carried out, regardless of any question of right or wrong. It must be borne in mind that, at the period of history which was referred to in the plaintiff's argument to shew that the words contained in the oath of abjuration were intended to be a test of Christianity—namely, in the reigns of Elizabeth and James I., there were no Jews in this country, for they had been banished in the time of Edward I., and were not restored until Cromwell was at the head of the State. At the time, however, when the 1 Geo. 1, c. 13, was passed, it was well known that Jews of wealth and consideration in the country were exceedingly numerous. The question then is, whether the legislature meant Jews to take the oath of abjuration in such a manner as to bind their consciences. If it be held that the words “on the true faith of a Christian” must be taken as an essential part of the oath, then, in the time of Geo. I., as at the present moment, any magistrate could have called, without reason given, upon *every* Jew to take the oath; and in such case one of the two following consequences must have ensued—either the Jew must at once have committed blasphemy or perjury, or he must have refused to take the oath, and been subjected to all the penalties of a Popish recusant convict. [*Martin, B.*—You contend that, if, immediately after the passing of the Act, a Jew had before a magistrate stated his willingness to do every thing, but had stated that he could not with truth or propriety use the words “on the true faith of a Christian,” the words of the statute would have been satisfied.] That is the defendant's argument. It was contended in *Omichund v. Barker*, that the oath consisted in touching the foot of a Brahmin. But what does it matter whether the form of swearing consists of words only, or an act only, or of both words and an act taken together? It is an absurdity to suppose that the legislature would compel *all* the loyal subjects of the Sove-

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reign to take an oath testifying to the loyalty and allegiance of the party required to take it, and yet that it would frame the oath in such terms that *one* class, at least, among the people could not take it. Again, it ought to be considered what the object of the oath was, and against what class of persons it was really directed. No person can be in the slightest degree acquainted with the subject of oaths and tests, as deduced from the history of this country, and dating from the period of the Reformation, without perceiving that all the oaths framed by the legislature were levelled solely against the Papists. The very persons who refused to take this oath were to be deemed *Popish* recusant convicts. It cannot be argued that the oaths were levelled at the Jews. The oath was only intended to be a test for the consciences of Roman Catholics, whom nobody doubted to be Christians, but of whom it was doubted whether they were not secretly favourers and supporters of the Pretender; and the object was to obtain the security of their attachment to the House of Hanover, and to enforce their abjuration of the claims of the House of Stuart. That object was completely attained by making the person taking the oath swear allegiance to the reigning Sovereign, and abjure the claims of the Pretender and his family. The first thing sworn was, that the King was

This is admitted to be a substantial part of the oath, as it materially qualifies the matter to be done or performed. But the words "on the true faith of a Christian" are no part of the oath or thing sworn to, for they do not extend the operation of the oath: they are part of the *form* and *manner* in which the party pledged his oath to what he had sworn before, and like the kissing the Testament, or the touching the Brahmin's foot, were merely the sanction or pledge of what had gone before. If the legislature intended to make this oath a test of Christianity, and that no one should take it who was not a Christian—that the party taking this oath, besides swearing that he did certain things, and did them willingly, &c., should also swear that he was a Christian—*then*, but in no other case, can the defendant admit that these words are words of substance, and cannot be rejected. The words "So help me God" are not to be found in the roll, for, although they were added to the oaths of allegiance and supremacy, they were not to the oath of abjuration. There are no words of obtestation, unless the words "on the true faith of a Christian" are to be taken as such. In the former Act, 1 Geo. 1, c. 13, the words "So help me God" were retained, but they are not in this Act. It is therefore submitted, that the omission of the words "So help me God" leaves a *form* of words merely, which does not amount to an oath, unless the words "on the true faith of a Christian" are held to be *asseveratory words*, conferring upon it that character. In Bishop Sanderson's Lectures on Oaths, p. 89, there is much of importance which bears upon this subject. The oath is there divided into two parts—the thing sworn to, and the form of swearing. In Puffendorf, also, as cited in *Omichund v. Barker*, the same distinction is observed, namely, "That part of the form of oaths under which God is invoked as a witness or as an avenger, is to be accommodated to the religious persuasion which the swearer entertains of God; it being vain and insignificant to compel a man to swear to a God whom he doth not believe, and

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therefore doth not reverence." On this principle, the words "on the true faith of a Christian" may and ought to be altered to suit the conscience of those who have to take the oath of abjuration. Suppose the words "So help me God" were used in an ordinary Court of justice paraphrastically, "So help me God the Father, God the Son, and God the Holy Ghost," or "So help me God the Holy and Undivided Trinity," which is the meaning of the term "God" to the Christian, could it be said that, whenever this oath was to be taken by a Jew, it might not be modified? On these grounds, the position, that, if the law imposes an oath and requires it to be taken, it must allow that oath to be taken so as to bind the conscience, holds good in the present case. The principle established by the case of *Omichund v. Barker* is in favour of that position, for in that case, where the law compelled a person, not a Christian, to give evidence, he was, after a solemn argument, allowed and directed to be sworn in such manner as was binding upon his conscience. In truth, there is no difference in principle between an oath administered to a witness in a Court of justice at common law, and that which is required by the statute of 1 Geo. 1, c. 13, to be taken by all classes of the Queen's subjects, whenever two justices of the peace

what the mischief was against which the common law did not provide, and against which the legislature intended to provide; thirdly, the remedy which Parliament has appointed for the mischief; fourthly, the reasons of that remedy.

The mischief against which the statutes imposing this oath intended to provide, was nothing more than the hostility of the Roman Catholics to the House of Hanover; and the remedy supplied, was the exacting of an oath of fidelity to that House. This applied to all classes of persons, to Jews as much as Christians. Their *fidelity* was required, but it cannot be said that they were *also* required to swear that they were Christians. If this absurdity was not intended, the *form* of the oath, not the oath itself, must be so construed as to carry out the intention of the legislature, according to the sound proposition of law, that where an oath is required to be taken, whether by statute or by common law, it is authorised and required to be taken in the manner binding on the swearer.

The remaining question turns upon the 1 & 2 Vict. c. 105. This is a declaratory Act, and enacts that every person shall be bound by an oath taken in any form declared by the swearer to be binding, and visited with the penalty of perjury the breach of any oath so taken. That naturally implies the power to take the oath, and affirms the proposition before stated, and to which there is no exception. It has been said that the 1 & 2 Vict. c. 105, applies only to such oaths as are to be taken in Courts of justice and upon similar occasions. It is remarkable that the only word in the 6 Geo. 3, c. 53, which would apply to Parliament, is the word "Courts," so that, unless Parliament be a Court, that statute does not apply to Parliamentary oaths. The statute of Victoria extends its operation to oaths taken "on every occasion whatsoever." For these reasons, it is submitted that the defendant is entitled to judgment.

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Channell, Serjt., in reply.—The propositions for which the plaintiff contends are, first, that the oath cannot be taken as the defendant has taken it, namely, on the Old Testament, inasmuch as part of the form given requires it to be taken on the Holy Evangelists, that is, the New Testament; secondly, if there be no objection to the oath being taken on the Old Testament, yet it has not been taken by the defendant in its entirety. It has been already suggested as being advisable to consider these questions, and to read the statutes, with reference to the spirit which prevailed in this country at the time the several Acts were passed; and assuming that a correct view is thus taken of the subject, the next thing will be, to see whether there are any subsequent statutes which dispense with the oaths instituted in such a spirit and in such times, that is to say, whether this oath has been repealed. The authority of *Omichund v. Barker* is not disputed; but it is contended that it applies only to oaths in Courts of law, where no form has been prescribed, and not to cases where a *Christian* oath has been imposed by Act of Parliament. There is nothing in the authority of that case to disturb the plaintiff's position, if it be shewn that this is a *statutory* oath. It has been suggested that the oath ceased to be compulsory upon the demise of the Sovereign in whose reign it was instituted. But each of the Acts relating to the oath of

considered as still in force under King William IV. But this objection has been disposed of as long ago as the decision in *Rex v. Green* (a), and, as to the Parliament in Ireland, by the case in 12 Rep. 110.

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Next, this is a *Christian* oath. For the determination of this point, the statutes contemporaneous with the imposition of the oath, and those immediately preceding and subsequent to that period, must be referred to (although some of them may have been repealed), to ascertain the spirit and intention of the legislature; for though the form of oath has been altered since the time of the 13 Will. 3, which still kept up the necessity of making that declaration, that Act has never itself been repealed, but was in force at a period extending beyond the 6 Geo. 3. The oath imposed by the 3 Jac. 1, (generally called the Oath of Allegiance and Obedience,) which has always been held to contain the germ of the oath of abjuration, had to be sworn on the Evangelists, and contained the words "on the true faith of a Christian," and was to be taken with the oath of supremacy, also an oath on the Evangelists. Then came the 30 Car. 2, leaving the two oaths still to be taken in the same way, but superadding and coupling with them the declaration against transubstantiation: and it will be remembered that this declaration existed at the time of the Acts of 1 Geo. 1, and 6 Geo. 3. This puts the matter beyond doubt, that the oath was intended to be imposed as a test of Christianity; and stronger language to shew such an intention could not be used. It would be a mockery to suppose that this declaration was to be made by any one who did not believe in our Lord and Saviour Jesus Christ.

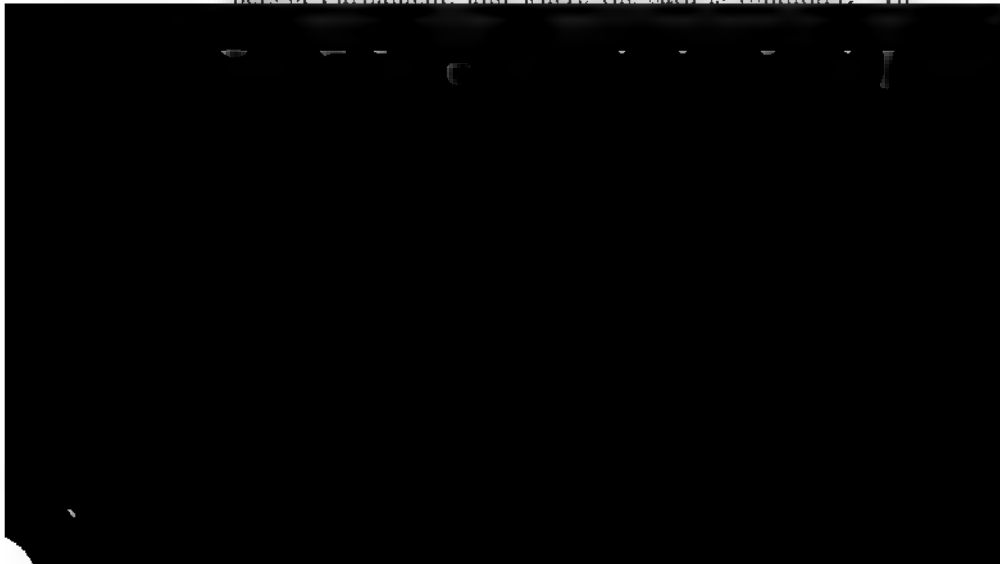
Then has the 1 & 2 Vict. c. 105, worked any change? That statute applies only to the *form* of taking the oath, even supposing that it has any application to this case;

(a) 1 Vent. 171.

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but it leaves the question as to the *words* of the oath untouched. Affirmative words in a statute do not effect the repeal of former Acts, unless they are utterly irreconcilable with them; and whether the statute of Victoria is declaratory or enacting does not affect the question. If the oath had been *in terms* required to be taken on the New Testament, the 1 & 2 Vict. would not have repealed the prior statutes as being inconsistent with its provisions. That Act merely says, that an oath, if taken in a particular manner, shall be binding, and will expose the party so taking it to the penalties of perjury in case he shall afterwards violate the oath so taken. That does not entitle the defendant to take the oath of abjuration in a manner different from that which has been appointed by a preceding statute.

The most important question in the case is, whether the words "upon the true faith of a Christian" are of the *essence* of the oath. It is hardly necessary to deny absolutely that they may not be in one sense a part of the oath, that is, a part of the thing sworn to. It is necessary to contend that the legislature intended them to be sworn; and that so they are of the *essence* of the oath. It has been urged that it was impossible that the legislature could have intended to make Jews swear that they were Christians. Such a result does not necessarily follow in the case of members of Parliament, and where the oath is voluntary. In



Act, 1 Will. & M. c. 18, which relieved the Quakers, required a declaration of their Christian faith. That Act states, that it was necessary for the safety of the realm that the Protestant religion should be firmly established. In short, the whole course of legislation shews that the statute was levelled, not only at all except Christians, but at all except Protestants. By the 9 Geo. 1, c. 24, all persons were required to take the oath or register their estates. But then it was said the Jews were willing to take the oath, omitting only the words "upon the true faith of a Christian." That may be so. Accordingly, the 10 Geo. 1, c. 4, was passed, enabling them to take the oath for the purpose, and for the purpose only, of the last-mentioned Act, with the omission of those words: but the 10 Geo. 1, c. 4, did not recite the 1 Geo. 1, and the effect of the clause contained in it as to Jews did not touch that statute. It was limited to the specific object of relieving Jews from registering their estates at a particular time under the 9 Geo. 1, c. 24, or within the extended time under the 10 Geo. 1, c. 4, the words used being "within the meaning of this Act and the said recited Act." Even under the 1 Geo. 1, the oath was to be taken differently for two different purposes, generally at Quarter Sessions, and for Parliamentary purposes before the Speaker. The first was strictly and absolutely obligatory, the second was merely necessary if a person wished to sit or vote in either House; so that the legislature might well have intended to give relief under the first class, without by any means including the second. But this was, in truth, an express declaration by the legislature that the words "on the true faith of a Christian" were an essential part of the oath; and this was also the case in the 13 Geo. 2, c. 7, the Colonial Naturalization Act, which contains a clause enabling Jews to omit those words out of the abjuration oath for the purposes of that Act. It may also be remarked, that not only are these very words required to be taken as set down

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in the Act, but to be *subscribed*, and thus they are proved to have been considered by the legislature as an important and essential part of the oath.

Cur. adv. vult.

The learned Barons, differing in opinion, now pronounced their judgments seriatim.

MARTIN, B.—This is an action to recover penalties, alleged to be forfeited by the defendant under the *statute* 1 Geo. 1, st. 2, c. 13, s. 17, and 6 Geo. 3, c. 53, s. 1, by reason of his having voted in the House of Commons without having taken the oath of abjuration contained in the latter statute.

The declaration stated, that the defendant was duly returned to serve in Parliament as a burgess for the borough of Greenwich, and that he voted in the House of Commons without having taken and subscribed the above oath, and thereby forfeited the sum of 500*l*. There were two other similar counts, but they were abandoned in order to raise the substantial question in controversy between the parties, and avoid any technical difficulty by reason of more than one penalty being recovered for alleged offences against the statutes committed on the same day.

The plea was "*nil debet*." The cause came on for trial



kisses the book: and that this form of taking an oath was and is binding upon the conscience of the defendant. That, before he voted, he came to the table of the House in the usual manner, and demanded to be sworn to the oaths required by law in the manner and form above mentioned upon the Old Testament, alleging it to be, as in truth it was, the form which was binding upon his conscience. That he then took the oaths of allegiance and supremacy in the form and manner aforesaid upon the Old Testament, and proceeded to repeat the oath of abjuration contained in the 6 Geo. 3, c. 53, substituting the name of Queen Victoria for that of King George, down to the words "upon the true faith of a Christian," which he deliberately and intentionally refused to repeat, and then added the words "So help me God," and kissed the book. That the Speaker objected that he had not taken the oath in the manner required by law, and requested him to withdraw, which he did not do, and *declared that he had taken the oath in the form binding upon his conscience, which the special verdict finds to be the truth.* The verdict then proceeds to state what took place with respect to the signature of the roll, and concludes by submitting to the Court whether the defendant had lawfully taken the oath of abjuration.

The case was argued before us in last Hilary Term; and it was contended, on behalf of the plaintiff, that the oath was a Christian oath, and could only be made by a Christian; that it could not be lawfully taken without repeating the words "upon the true faith of a Christian," which, as it was argued, were a necessary and essential part of the oath.

Four points were made on behalf of the defendant.—First, that the oath was not now obligatory to be taken at all—that the obligation expired on the death of King George III., or at all events upon the death of George IV., and that there was no lawful authority to substitute the name of the reigning Sovereign. I think this point not

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tenable, and that the name of King George is introduced into the form of oath in its corporate character, and represents all his successors. See the case of *The Parliament in Ireland* (a), and *Rex v. Green* (b).

Secondly, that the words "upon the true faith of a Christian" were repealed by the stat. 10 Geo. 1, c. 4, to which I shall have occasion hereafter to refer. I also think this point not tenable.

Thirdly, that by the true construction of the statutes, an obligation is imposed upon all her Majesty's English subjects, whether Christian or Jew, to take an oath binding upon their conscience, pledging them to the several matters contained in the oath prescribed by the stat. 6 Geo. 3, c. 53. That the words "upon the true faith of a Christian" were not intended by the legislature as a religious test at all, but were inserted for an entirely different object and purpose. And that, when the person taking the oath is not a Christian, he not merely may, but ought, to omit these words, and take the oath in the form binding upon his conscience; and that the oath so taken is made in a lawful manner, and relieves the taker from all penalties which are consequent upon the refusal or neglect to take the oath. This is the substantial question in the case.

Fourthly, it was argued that the words "upon the true faith of a Christian" may be omitted by virtue of the stat.



Chancellor *Hardwicke*, assisted by the two Chief Justices and the Chief Baron, and has always been considered of great authority. The question was, whether the deposition of a Gentoo witness taken in India, on an oath administered to him in the form binding upon persons professing the Gentoo religion, was admissible in evidence in a suit in the Court of Chancery in this country. The form of administering the oath was, that the witness touched with his hand the foot of a Brahmin, whilst another priest touched the hand of the latter. In the arguments and judgments in that case, the law and practice as to the administering of oaths to Jews were much discussed; and from the authorities there cited, it appears that the Jews were resident in England before the Conquest, and then took oaths; and an instance was cited from Wilkins's Saxon Laws, of a writ issued to summon "sex legales homines et sex legales Judæos" to make a jury. Various other authorities were there cited, to shew that oaths were administered to Jews before their banishment, which took place in the reign of King Edward I.: (Mad. Hist. Exch. 167). It is there stated also, that it is supposed that they were not by law permitted to return until the time of the Commonwealth; but however this may be, there is no doubt that for a very long period of time there have been in England very many Jews, British-born subjects, entitled to the protection and subject to the control of the laws, precisely in the same manner and to the same extent as the Christian subjects of the realm.

The doctrine laid down by the Lord Chancellor and all the other Judges was, that the essence of an oath was an appeal to a Supreme Being, in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood; and that the form of taking an oath was a mere outward act, and not essential to the oath; which ought to be administered


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to all persons according to their own peculiar religious opinions, and in such manner as most affected their consciences.

The present oath of abjuration itself is contained in the stat. 6 Geo. 3, c. 53, s. 1. But this statute was passed, in 1766, merely for the purpose of making an alteration in its form, which became necessary in consequence of the death of the old Pretender, who died in 1765; and in order to ascertain its true construction, it must be considered together and in connexion with the stat. 1 Geo. 1, st. 2, c. 13. This latter statute was made upon the accession of the House of Hanover, and contains the three oaths, viz. of allegiance, supremacy, and abjuration; and, as has been already observed, the 6 Geo. 3, c. 53, merely alters the form of the latter oath, but makes no alteration in its substance.

It was submitted by the learned counsel for the plaintiff, in his very able argument, that, in order to arrive at the true construction of these Acts of Parliament, it was necessary to go back to the old statutes which originally imposed parliamentary oaths, and attentively consider their provisions and requirements; and he referred us to the stat. 1 Eliz. c. 1, as the first statute bearing upon the subject. That was intituled "An Act restoring to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all Foreign Power repugnant to



public officers were required to make an oath upon the Evangelists of the Queen's supremacy. The words "upon the true faith of a Christian" were not contained in this oath. It concluded with the words "So help me God, and by the contents of this book."

Had this statute continued in force until the present time, the requirement that the oath should be taken upon the Evangelists would have raised a question somewhat similar to that in the present case: for although it was holden in the case of *Robeley v. Langston* (a), that a Jew sworn upon the Old Testament was sworn upon the Evangelists, it seems to me that the opinion of the Lord Chief Baron, in *Omichund v. Barker*, that an oath upon the Old Testament was not an oath upon the Evangelists, is the better opinion.

This statute did not extend to members of the House of Commons; but by the 5 Eliz. c. 1, s. 16, it was extended to them, and they were required to take the oath of supremacy before the Lord Steward.

It is also obvious that this statute was solely directed against the Pope and the see of Rome. It begins by reciting the "hurts, perils, and dishonours, befallen to the Queen and the whole estate of the realm, by means of the jurisdiction and power of that see, and the danger then existing from the fautors of the said usurped power, at that time grown to marvellous outrage and licentious boldness," and then "requiring more sharp restraint and correction of laws than hitherto:" and every section of the statute is directed to the single object of the protection of the Queen and State against the Pope and persons of the Roman Catholic religion.

The next statute to which we were referred by the learned counsel for the plaintiff, was the 3 Jac. 1, c. 4; and it was stated by him to contain the germ of the oath of abju-

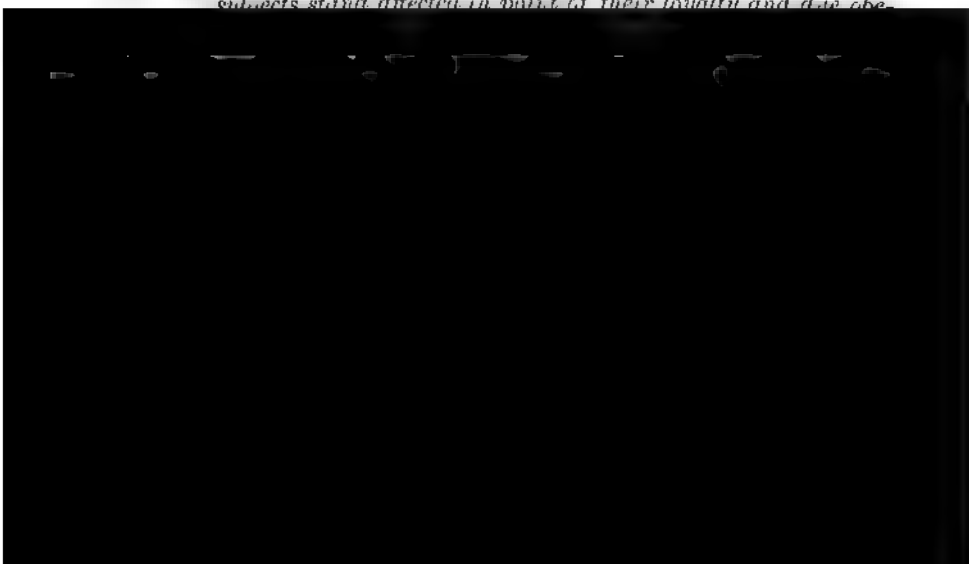
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(a) 2 Keb. 314.

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ration. I concur with him in thinking that this statute has an important bearing upon the present question. The words "upon the true faith of a Christian" first occur in it; and if the object and intention of the legislature in inserting them was to create a test of Christianity, they then would be of the essence of the oath therein contained; but if they were inserted for an entirely different purpose and object, and were not intended as a test of Christianity at all, but as a test of and security for loyalty and obedience, they would then seem not to be of that essential nature.

The Act is intituled "An Act for the better discovering and repressing of Popish Recusants." It was passed immediately after the Gunpowder Plot, and begins by reciting that it was found by daily experience that many of his Majesty's subjects, who adhered in their hearts to the Popish religion, were by its infection and by the wicked counsels of Jesuits and others, so far perverted from their loyalty and allegiance as to entertain treasonable conspiracies, as appeared by the late attempt to blow up the King and Parliament, undertaken, at the instigation of Jesuits and others, by their scholars taught and instructed for that purpose. It then proceeds to make enactments directed against Popish recusants, and by the 13th section enacts, *that, for the better trial how his Majesty's subjects stand affected in point of their loyalty and due obe-*



deny the authority of the Pope to depose the King, or dispose of any of his kingdoms or dominions, or to authorise any foreign prince to invade them, or to discharge any of his subjects of their allegiance. It then proceeds, as in the oath of abjuration, to pledge the taker to bear faith and true allegiance to his Majesty, his heirs and successors, and him and them to defend to the uttermost against all conspiracies and attempts whatsoever, which should be made against his or their persons, their crown and dignity, by reason or colour of any sentence of excommunication or deprivation, or otherwise; and to do his best endeavour to disclose and make known unto his Majesty, his heirs and successors, all treasons and traitorous conspiracies which he should know or hear of to be against him or any of them; and concludes thus, in the very words of the conclusion of the present abjuration oath:—"And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, or mental evasion, or secret reservation whatsoever. And I do make this recognition and acknowledgment heartily, willingly, and truly, upon the true faith of a Christian. So help me God."


It is apparent from this, as well as many other Acts of Parliament, that an idea then and long afterwards prevailed, that Roman Catholics were in a different condition with regard to oaths from persons of other religious denominations; and that the Jesuits taught that the Pope had power to grant absolution from oaths, and to dispense with the performance of and adherence to them, and that Roman Catholics themselves made these parliamentary oaths with mental evasions and secret reservations, which were supposed to have the effect of nullifying their obligation; and the conclusion of the oath is expressly directed against this supposed state of things. Now Jews

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were not then resident in the kingdom, so that it is clear that the words "upon the true faith of a Christian" were not inserted with any hostile object towards them; and the statute expressly declares that the oath was imposed "for the better trial of the loyalty and obedience of his Majesty's subjects;" and it is perfectly obvious to my mind, that the words were introduced into this oath not as a test of Christianity at all, but in order the more effectually to bind and affect the consciences of Roman Catholics. I think these words were added in order to create the most sacred and binding obligation upon them, and for no other purpose. The Jews were never thought of; and indeed the legislature in all probability never contemplated that there were any subjects of the kingdom who were not Christians. Members of Parliament were not included in this statute; but by stat. 7 Jac. 1, c. 6, they, and a great variety of other persons, were required to take the same oath.

The next statute mentioned by the learned counsel for the plaintiff was the 30 Car. 2, st. 2, by which it was enacted, that no person should vote in the House of Commons until he took the oaths of allegiance and supremacy, and made the declaration against transubstantiation therein contained. It was by means of this declaration that Roman Catholics were so long excluded from Parliament



which all persons bearing offices and places of trust under the Crown were required to receive the same sacrament within three months after their appointment.

The next statute referred to was the 1 Will. & M. st. 1, c. 1, which enacted anew the oaths of allegiance and supremacy, expressly naming therein King William and Queen Mary; and provided that they should be taken by all members of Parliament, together with the declaration against transubstantiation, within the same time as limited by the stat. 30 Car. 2, above mentioned.

A question here arises, whether there was any oath or declaration at this time to be taken or made by members of Parliament which a Jew could not take; and it seems to me that there was none. The words "upon the Evangelists" do not occur in either of the last-mentioned Acts of Parliament, and there was nothing in the oaths of allegiance and supremacy themselves to prevent their being taken by a Jew: indeed these oaths remain in the same form at the present time; and the defendant was permitted to take them, without objection, upon the Old Testament, at the table of the House of Commons. The declaration against transubstantiation is expressly declared to be for the purpose of disabling Papists from sitting in either House of Parliament—it was not at all directed against Jews, and it seems to me that a Jew might have made it with truth.


The next statute referred to by the learned counsel for the plaintiff was the 13 Will. 3, c. 6, and it is by it that the original oath of abjuration was imposed. It is probable, as was suggested by the learned counsel, that it was to a considerable extent taken from the oath prescribed by the 3 Jac. 1, c. 4, but it certainly is the original oath of abjuration. The legislative measures with respect to it are as follows:—By the 1 Ann. st. 1, c. 22, the oath is altered in form, by substituting the name of Queen Anne

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for that of King William; but the same persons are required to take it, and are subjected to the same penalties in case of neglect or refusal. By the 6 Ann. c. 7, s. 20, the oath was altered to meet the state of things expected to arise upon the death of the Queen without issue. By the 1 Geo. 1, st. 2, c. 13, on the accession of the House of Hanover, the oaths of allegiance, supremacy, and abjuration were re-enacted; and by the 6 Geo. 3, c. 53, as has already been observed, the form of the oath of abjuration was altered, to meet the state of things consequent upon the death of the old Pretender: and the penalty is due, if at all, by virtue of these two latter statutes.

The ordinary rule for the construction of statutes is that laid down in *Heydon's case* (a)—first, ascertain what was the common law; secondly, what was the mischief for which the common law had not provided; thirdly, what was the remedy provided by the statute; and, fourthly, what was the true reason of the remedy. This still continues to be the rule. In *Lyde v. Barnard* (b), it was laid down by this Court in their judgment, that words in a statute may be construed in a sense different from the ordinary one, when the Act is intended to remedy some existing mischief, and such a construction is required to render the remedy effectual—for an Act must always be construed to suppress the mischief and advance the remedy.



as to the common law. The only oath imposed by the common law upon the subjects of this realm is the oath of allegiance, which originated in the old feudal oath of fealty; and this oath all persons, capable of taking an oath at all, can lawfully take. Next, as to the mischief intended to be remedied by the statutes which contain the oath of abjuration. To my mind, it is clear that the evil against which all these statutes were directed was the existence of persons disaffected to the succession of the Crown, as altered at the Revolution. The Act of 13 Will. 3, c. 6, which contains the original oath, is intituled "An Act for the further Security of his Majesty's Person, and the Succession of the Crown in the Protestant Line, and for extinguishing the Hopes of the pretended Prince of Wales and all other Pretenders, and their open and secret Abettors." The words of the oath are, in substance, as follows, and clearly shew the same thing:—"I, A. B., do truly and sincerely acknowledge, profess, testify, and declare, in my conscience, before God and the world, that our Sovereign Lord King William is lawful and rightful King of this realm, and of all other his Majesty's dominions and countries thereunto belonging. And I do solemnly and sincerely declare, that I do believe in my conscience that the person pretending to be Prince of Wales during the life of the late King James, and since his decease pretending to be and taking upon himself the style and title of King of England by the name of James III., hath not any right or title whatsoever to the crown of this realm, or any other the dominions thereunto belonging. And I do renounce, refuse, and abjure any allegiance or obedience to him. And I do swear that I will bear faith and true allegiance to his Majesty King William." The oath then proceeds to pledge the person taking it to defend the King, to disclose all treasons and traitorous conspiracies known to him, and to support to the utmost of his power the limitation and succession of the Crown as it stood limited by the

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acts of settlement, and concludes with the same identical words used in the oath contained in the stat. 3 Jac. 1, before mentioned.

The stat. 1 Geo. 1, st. 2, c. 13, is intituled "An Act for the further Security of his Majesty's Person and Government, and the Succession of the Crown in the Heirs of the late Princess Sophia, being Protestants, and for extinguishing the Hopes of the pretended Prince of Wales, and his open and secret Abettors:" which is in substance the same title as that of the 13 Will. 3, c. 6. By the 1st section, the three oaths, viz. of allegiance, of supremacy, and of abjuration, are re-enacted, and merely altered in form to meet the state of things consequent upon the accession of the House of Hanover. By the 10th section, two justices of the peace may tender the oath to any person whom they may suspect to be disaffected; and every person neglecting or refusing to take it is to be esteemed and adjudged a Popish recusant convict, and to forfeit and be proceeded against as such. This involved the incapacity to hold any office or employment, to keep arms for his defence, to come within ten miles of London, to bring any action at law or suit in equity, to travel above five miles from his home unless by license, upon pain of forfeiting all his personal property; and, if required by four justices so to do, to abjure and renounce the realm, and in the

any deed of gift, or to vote at any election for members to serve in Parliament; in short, is utterly deprived of the protection of the law, and of the most common and ordinary natural rights of all mankind.

It is to be observed that, in all the preceding statutes, the oaths of allegiance, of supremacy, and of abjuration were required to be taken by persons holding certain offices, and in certain professions only; and that there was no legislative obligation upon the subjects of the realm generally to take them. But by the 10th and 11th sections of the last Act, the most extensive powers are given to two justices, to compel all persons whom they may think disaffected or dangerous so to do under the most severe penalties; and I certainly think that whatever is the proper and legal form of administering the oath of abjuration to a Jew not a member of the legislature, is the proper and legal form of administering it to a Jew who happens to be one; and that it cannot be lawful to omit the words "upon the true faith of a Christian" in the former case, and to insist upon them in the latter.

Next, as to the remedy proposed to be provided. To ascertain this rightly, it seems to me absolutely necessary to consider what was the prevailing state of opinion with regard to political oaths at the times when these statutes passed. And it is to my mind clear, from the perusal of them, that, from the reign of Queen Elizabeth down to that of King George III., it was considered by the legislature to be a matter of the utmost benefit and advantage to the Crown and State that the subjects of this realm should take these oaths (of which the oath of abjuration was one); and that not as a mere matter of form, but that the person taking it should be really bound in his conscience to the matters therein contained, and under a religious obligation to perform and abide by them; and I think the remedy provided and meant to be provided by the statute was, that persons should be compellable to

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take this oath of abjuration, and, as a natural and legal consequence, as it seems to me, to take it in a manner and form binding upon their consciences, and thereby secure to the Crown and the Government the benefit and advantage arising from and consequent upon an oath to the above effect.

At this time, Jews were living in England in very considerable numbers, and, in common with the other subjects of the realm, were liable to be called on to take the oath; and their neglect or refusal to take it subjected them to the penalties which I have mentioned. Now, to permit a Jew to make, much more to insist upon his making, an oath "upon the true faith of a Christian," seems to me to be absurd. But if these words be omitted, and the Jew be called upon and required to take the oath without using them, then, according to the finding of the special verdict, it would be obligatory and binding upon him to the fullest extent, and would secure to the Crown and Government the entire advantage and benefit contemplated and intended by the statute. It therefore seems to me, that a construction which admits of the omission of these words in the case of a Jew is required to render the statute effectual, and directly tends to suppress the mischief and advance the remedy. If, however, it was intended by the legislature that these words should be of the substance



who were truly believed to be principally Christians, of the Roman Catholic religion; and I think the words “upon the true faith of a Christian” were inserted in the oath, not as a test of Christianity, but for an entirely different object, viz. for the purpose of framing an oath in a form the most effectually binding upon the consciences of the Roman Catholics.

I have already alluded to the then existing opinion, that persons of the Roman Catholic religion took oaths with mental evasions and reservations, which it was supposed relieved them from their obligation. And I think it clearly appears, from the concluding paragraph of the oath, that the real motive for the introduction of these words was to bind their consciences in the most solemn manner. The 10th section of the statute also shews that the statute itself was mainly directed against the Roman Catholics; for one of the penalties thereby imposed was, that any member of the House of Commons voting without having taken the oath should be deemed and adjudged “a Popish recusant convict.” It is obvious that the legislature could never have intended that a Jew should be so designated, when it is considered that the offence of recusancy was purged by the “convict” making an acknowledgment of sorrow for not having attended divine service according to the rites of the Church of England, and denying that the Pope has any power in this kingdom.

There is another rule for the construction of statutes, which was enunciated by the late Mr. Justice *Burton*, in the case of *Warburton v. Loveland* (a), and which will be found in the judgment in *Becke v. Smith* (b). It is as follows:—“It is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is

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(a) 1 Hud. & Br. 648.

(b) 2 M. & W. 191.

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at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no farther." This rule has very frequently been relied upon of late years, and especially in this Court, and in the judgment in *Becke v. Smith* was stated to have been adopted by it. Now to apply it to the present case. What was the intention of the legislature, to be collected from the statute itself, in imposing the oath of abjuration? Upon this point I cannot think there is room for much difference of opinion: and that the intention was, that all members of the legislature, and almost all persons holding offices in the State, and all persons whatever suspected of disloyalty or disaffection to the new succession, should be liable to be called on to take the oath, and be bound in their consciences by a religious obligation to the several matters contained in it. In the case of Jews this intention can be fully effected, and all inconvenience avoided, by so far varying or modifying the language as to omit the words "upon the true faith of a Christian"—for the special verdict finds that Jews are bound by the oath when these words are omitted.

Again, I do not think there can be any difference of opinion, but that a Jew is liable to be called on to take



of the Stuarts. It was not, however, foreseen that any other than Christians were liable to take it; and the words “upon the true faith of a Christian” were inserted with a particular object, not at all relating to Jews. But Jews are liable to be called upon to take it, and by the omission of these words can put themselves under the religious obligation to abide by and perform it, whilst, by using them, there would be no binding religious sanction to render it obligatory upon them. Now, can a stronger instance of absurdity be given than to insist that a Jew, to whom the oath was administered, should swear it “upon the true faith of a Christian;” and on the contrary, do not common sense and reason point out that the proper mode of administering the oath is to *insist* upon his omitting these words, and thereby make it in a form binding and obligatory upon him? And, in my opinion, if this be the lawful form of administering the oath to a Jew not a member of the legislature, it is a lawful form of administering it to one who is;—the statute making no distinction between the one and the other.

These are highly penal statutes, and ought to receive a just and reasonable construction. What is such a construction as is consonant to justice and reason is a point upon which men’s minds will much differ; but to mine it does not appear consonant to either to hold that a Jew, who is certainly liable to be called on to take the oath, and who, as is found by this special verdict, is perfectly capable of taking and being bound by it, and who is willing to take it in a form and manner binding upon his conscience, and who merely refuses to use the words “upon the true faith of a Christian,” which are not at all applicable to him, or, in my opinion, intended by the legislature so to be, and which, if used by him, would render the oath null and absurd, if not worse, is by such refusal to become incapable of suing either at law or in equity, to be guardian of his own child, to be confined within

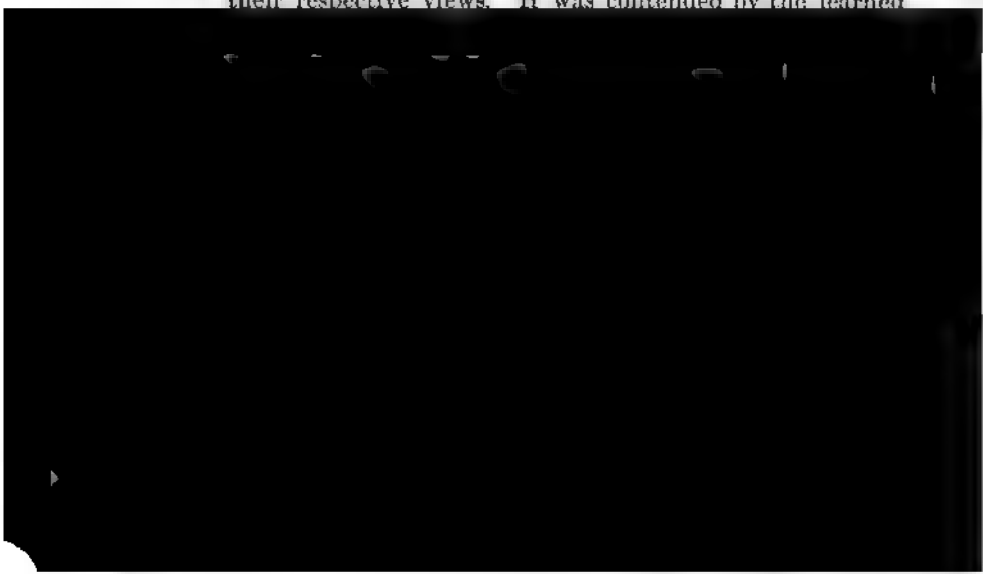
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the limits of five miles from his home, to be incapable of keeping arms for his defence, or of having property bequeathed or given to him; and, at the discretion or caprice of four justices of the peace, to be liable to be banished; and, in the event of his returning to the kingdom without the license of the Crown, to suffer death as a felon.

As I have already intimated, I am of opinion that, upon the true construction of the statute, and in order to effectually carry out its object and intention, a Jew ought to take the oath of abjuration omitting the words in question: and it appears to me that a construction the other way, which of necessity leads to the consequences I have just mentioned, and in addition excludes Jews from sitting and voting in Parliament, not by a direct and intentional legislative Act, but by an unforeseen and unintended application of a few words inserted in an oath with an entirely different object, is not in accordance with what I consider to be the principles and practice of the law of England. As before observed, the statute 6 Geo. 3, c. 53, merely alters the form of the oath, and subjects persons neglecting or refusing to take it to the consequences as enacted by the former statute.

There was another statute, the 10 Geo. 1, c. 4, which was relied upon by both the learned counsel as supporting their respective views. It was contended by the learned



Jew essential to the due taking of it. This statute appears to have been enacted under these circumstances:— By a statute of the 9 Geo. 1, c. 24 (which passed in 1722), persons who neglected to take the oaths prescribed by the 1 Geo. 1, c. 6, before the 25th December, 1723, were obliged to register their estates, and the statute 10 Geo. 1, c. 4, was made to amend this Act, by enlarging the time for taking these oaths until the 28th of November, 1724; and in the 18th section it was enacted that whenever any subject of his Majesty professing the Jewish religion should present himself to take the oath of abjuration “in pursuance of the above-recited Act or this Act,” the words “upon the true faith of a Christian” should be omitted, and such persons were to be sworn in like manner as Jews were admitted to be sworn to give evidence in Courts of justice. These Acts of Parliament appear to be the foundation of a class of statutes which very soon became annual, and continue to the present time, known by the name of the “Indemnity Acts.” This provision with respect to Jews is not to be found in any of them except in the statute above mentioned. I agree with the learned counsel for the plaintiff, that this section in its terms only extends to the oath prescribed to be taken by virtue of the statute itself, and of the statute 9 Geo. 1, c. 24, recited in it; but I do not think that the argument on either side is much advanced by reason of this 18th section. It is quite notorious that Acts of Parliament are frequently made, and that much more frequently sections are introduced, to meet objections and set at rest doubts, without much consideration as to whether they be really well founded or not; and considering the class of persons by whom this oath is to be administered, it might well be that the legislature thought it desirable, in the case of Jews, to expressly dispense with the words “upon the true faith of a Christian,” although, upon the true construction of the Act by persons skilled in the law, the use of such

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words ought to be omitted. On the other hand, as was contended by the learned counsel for the defendant, the omission of this enactment in the subsequent Indemnity Acts may have a tendency to shew that the continuance of it was deemed unnecessary, and that Jews might lawfully take the oath without using the words—for there is no reason whatever to suppose that the legislature at all desired to impose any difficulty upon Jews in respect of this oath. The arguments, on both sides, on this point do not appear to me to be of much weight.

There was another Act of Parliament referred to by the learned counsel for the plaintiff, the 13 Geo. 2, c. 7, being an Act for naturalising such foreign Protestants and others, (the others being Quakers and Jews), as should settle in the American colonies. In the 3rd section of that Act it is recited, that, by reason of the words “upon the true faith of a Christian,” Jews may be prevented from receiving the benefit of the Act, and it is enacted that these may be omitted in like manner as by the 18th section of 10 Geo. 1, c. 4. The argument from this section is the same, perhaps not so strong, as that I have already referred to, and is open to the same answer.

There were a variety of other statutes mentioned, beginning with the 13 & 14 Car. 2, c. 1, with respect to Quakers. It is clear from the provisions of this Act, that



tutes much assist us in arriving at the true conclusion upon the present question.

The fourth point made by the learned counsel for the defendant was, that the defendant was authorised to omit the words "upon the true faith of a Christian" by virtue of the stat. 1 & 2 Vict. c. 105. I do not think that this statute has of itself such an effect. In truth, it merely enacts that the defendant was bound by the oath as taken by him, and would be liable to any temporal punishment consequent upon his swearing falsely to it; but in reality this special verdict finds that the defendant was so bound; and I think he would be liable to any penal consequences consequent upon his oath being false, without the aid of this statute. There is no doubt considerable difficulty in duly considering the present question, arising from the circumstance that at the present day very many, probably the greater number of persons, are disposed to consider the taking of these parliamentary oaths—especially the oath of abjuration, which in reality has become worn out, (the mischief against which it was directed having become extinct by the failure of the direct line of the house of Stuart)—to create no real binding obligation upon the conscience, and to be a mere matter of form. But it was not so considered when the stat. 1 Geo. 1 was passed. It is obvious from it, and a variety of other statutes passed in the reign of Queen Anne, that the legislature attached very great importance to the religious obligation imposed upon the conscience by taking these oaths, and deemed that an immense public benefit and advantage was thereby obtained for the Crown and Government; and as a Jew, by omitting the words "upon the true faith of a Christian" might have been placed under the conscientious obligation created by taking the oath of abjuration, I think I best carry out the intention of the legislature, and give the true legal construction to the statute, by holding that the legal form of administering the oath to a Jew is to omit these

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words; and that I thereby render the statute more effectual, by suppressing the mischief and advancing the remedy contemplated by it. For these reasons I am of opinion that the defendant lawfully took the oath, and is entitled to the judgment of the Court.

ALDERSON, B.—My Brother *Martin* has fully stated the pleadings and the findings of the jury in this case, and it is not necessary, therefore, that I should repeat them. On several points in this case there is no difference of opinion on the Bench. We all agree in thinking that, of the four points made by Sir *Fitzroy Kelly*, three at all events cannot be supported. The only point on which we entertained any doubt, and on which I regret to find we are not now agreed, is whether, in taking the oath of abjuration, Mr. Salomons, the present defendant, was bound to have added the words “upon the true faith of a Christian” to those which he did consent to utter and attest by his oath; or whether, by designedly and of purpose omitting those words, he is in fact to be deemed not to have taken that oath at all, and so to have incurred the penalties contained in the 17th section of the 1 Geo. 1, st. 2, c. 13. It is on this point alone, therefore, that I shall deliver my judgment; and I am obliged to say that I differ with my learned Brother in his view of the case, and have come

of the party swearing. Thus, a Jew is to be sworn on the Book of the Law and with his head covered, a Brahmin by the mode prescribed by his peculiar faith, a Chinese by his special ceremonies, and the like. But it is also clear, and expressly admitted by Lord Chief Justice *Willes* in his judgment, referring to Lord *Coke's* authority on the subject, that in the case of oaths of office or of qualification, where the very form of the oath as well as the oath itself is prescribed by the legislature, there the directions of the legislature must be literally followed; and the oath must, and can only lawfully, be taken in the prescribed form, until that form be altered by the same authority which appointed it. The question therefore here is, have the legislature required the oath of abjuration to be taken in a prescribed form, and are the words "upon the true faith of a Christian" a part of that prescribed form? Now, it is to be observed, and it is of the greatest importance to advert to this, that the legislature uniformly speak of "*the* oath of abjuration" where they require it to be taken—they do not use the indefinite article, but the definite one. The inference is inevitable, that they contemplate the allowance of but one oath of abjuration, in one form, to be used by all persons required to take that oath. Whatever form of oath therefore was required to be taken by the Roman Catholic, the same form was to be adopted by the Protestant, whether churchman or dissenter; and the same (unless there be some special provision made, as in some cases there is,) must be taken by the Jew, or the Turk, or any other religionist who may be liable to take the oath, as a qualification for office, or for any other required purpose. Unless this were so, the legislature would never have fixed a form, but would have said that such persons must take *an* oath of abjuration to the substance and effect following, and not "*the* oath" of abjuration in the tenor following, as they have done. It seems to me that the legitimate result of my Brother *Martin's* reasoning is, therefore, to make the

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legislature, by a somewhat forced construction, use this indefinite mode of expression, whereas they have clearly used a definite one; so that it would follow, according to his view of the case, that they must be supposed to have allowed one form of the oath of abjuration to be used by Jews, another by Roman Catholics, and possibly another by persons of a different persuasion. This, however, is a conclusion so contrary to the words they have used that I cannot bring myself to adopt it. If then there be, in the absence of any special exception expressly made by the legislature, but one form of the oath of abjuration to be adopted by all, we must proceed to inquire whether these words are an essential part of that form. I proceed therefore to examine how this clause first got into the oath of abjuration. It is not found in the oath prescribed in the reign of Elizabeth, but is first found in 3 Jac. 1, c. 4, which was passed upon the discovery of what is called the Gunpowder Plot. It is a curious fact, only lately brought to light by the publication of a MS. from the Bodleian Library at Oxford, by Mr. Jardine, that one of the main proofs used by Lord *Coke*, when he laid that case before the jury, was the production of a little book, found in the chamber of Francis Tresham, one of the conspirators mentioned in the Act, called "A Treatise on Equivocation." This treatise, corrected in the handwriting of the Jesuit

equivocation or mental reservation," he may still equivocate and mentally reserve, without danger to his soul. But in that treatise there is one exception to all this. No person is allowed to equivocate or mentally reserve, without danger, if he does so, of incurring mortal sin, where his doing so brings apparently his true faith towards God into doubt or dispute. For though he may lawfully on proper occasions omit to avow his true faith, he must never, by what he says or swears, bring apparently his true faith into doubt or dispute with others. Now this treatise being before the Government of King James I., and in the hands of his Attorney-General, and used at the trial of the Gunpowder Plot, we find in the same year, 1605, that in a statute enacted mainly with reference to the same plot, these words "upon the true faith of a Christian" are for the first time added to the oath of obedience then framed, and for the obvious purpose, as I think, of preventing effectually all such equivocation, by conclusively fixing a sense to that oath which by no evasion or mental reservation should be got rid of, without (even in the opinion of the Jesuit doctors themselves) incurring the penalty of mortal sin. They were therefore, I think, not merely a part of that oath, but the most effectual and stringent provision in it. I do not therefore call this properly an oath intended as a test of Christianity—which it was not—nor as a mere test of obedience—but an oath intended as a test of obedience, and framed so as to be a test against all equivocation also. But this, though the fact to which I have referred is a very curious confirmation of the view I take of the importance of the words on which this case turns, is not necessary to my opinion. It would be quite sufficient, I think, to affirm that the legislature have said expressly, as they do, that an oath is to be taken, "the tenor of which oath hereafter followeth"—for "the tenor" implies that all the words which follow thereafter are part of the oath itself. It is to be observed that, in all the course of legislation on this subject, either

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these words "the tenor of the oath," or equivalent expressions, are throughout used by the legislature. I will shortly refer to them. In the first place, this same oath of obedience was by stat. 7 Jac. 1 extended and applied to the members of the legislature, and to all persons enumerated who exercise any functions or hold any offices in the State. No one reading this Act can, I think, doubt that the legislature meant this enactment to be general, and without any exception of persons, whatever might be their religious opinions. The 30 Car. 2, st. 2, left these oaths untouched, adding however a declaration against transubstantiation. It is unnecessary to refer to the intermediate Acts of the 1 Will. & M., st. 1, cc. 1 and 8, more particularly. I come to the 13 Will. 3, c. 6, which first established the oath of abjuration, and there the words are—that the persons required to do so shall take "the oath as hereinafter mentioned;" setting out expressly the form, including and ending with the words "upon the true faith of a Christian," introduced before into the old oath of obedience. This form of oath was not only to be taken, but subscribed also; which shews, I think (for there is no trace of double subscriptions to be found), that one form only was to be allowed and adopted without addition or omission. With certain alterations in the reign


of abjuration (the legislature still using the definite article "the") shall be administered in such manner and form as is hereinafter set down and prescribed, that is to say, &c.; and then, as before, the oath is set out, ending with the same words "upon the true faith of a Christian." Now, when I find the legislature beginning with "the tenor of the oath," and going on with "the oath as hereinafter mentioned," then saying "the oath in the words following," and finally "the oath to be administered in such manner and form as is hereinafter mentioned and prescribed," and find also that all these expressions are followed by a form containing these very same words, how am I to escape from the conclusion that these words do form a part of the oath prescribed? But it is argued that to apply it to the Jews involves an absurdity, and that according to what has been, not improperly, called the golden rule of construction, we must modify the literal construction of these Acts so as to get rid of the absurdity: I add (and I hold it to be part of the rule), only so far as is absolutely necessary to get rid of the absurdity. But let us see whether it is absurd to apply these provisions to the Jew as well as to the Christian. The legislature did not require the first oath of obedience to be taken by all, but only by such persons as were reasonably liable to suspicion by two justices of the peace acting judicially, or by persons who had omitted to do certain acts. It may be, and it perhaps was, unjust in the legislature so to enact. But we must take good care, in applying the golden rule, not to confound injustice with absurdity. The reason of the rule is, that the absurdity induces us to conclude that the legislature did not so intend. I am afraid, if we say that in old times, such as those of the Gunpowder Plot, the legislature must be held not to have intended what now we judge to be unjust, we shall ourselves be guilty of the grossest absurdity. I am afraid that I should, if that were the proper principle to be adopted, be obliged to hold

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that almost all the penal statutes had no operation at all, for I think that the most of them were grievously unjust. I can see nothing in this or the subsequent Acts containing the oath of abjuration, to induce me to believe that the legislature did not intend literally what they said expressly—viz. that these Acts, and this oath, were to apply to, and be taken by, all the classes of persons therein named, of whatsoever form of religion, Catholic, Protestant, Quaker, or Jew, they might be, and in the very form set down. And I am confirmed, as I think conclusively, in this, by finding that where, on its being brought before them, the law was found to press unfairly on any of these persons, the legislature has from time to time relieved them, by dispensing with the swearing, and allowing the Quakers to affirm, and by dispensing with these very words of the oath “upon the true faith of a Christian” in the case of the Jews in certain cases. That dispensation unfortunately does not extend to this case, but its limited existence seems to me to shew conclusively the opinion of the legislature itself on this point.

The words of the 13 Geo. 2, c. 7, s. 3, are very remarkable. The Act recites “Whereas the words ‘upon the true faith of a Christian’ are contained in the latter part of the oath of abjuration, and whereas the people professing the Jewish religion may thereby be prevented from receiving



“all persons”—as indeed could not well be doubted—and that but for those indulgences they were always bound to take the oath of abjuration including these words: and this Act was passed in 1739, when Lord Hardwicke was Chancellor, and Sir Dudley Ryder and Sir John Strange were Attorney and Solicitor-General: and the Acts of the 9 & 10 Geo. 1 were passed when Lord Macclesfield was Chancellor, and Lord Raymond and Lord Hardwicke Attorney and Solicitor-General. But it is now said that these three Acts were wholly unnecessary, and that these great lawyers ought to have known it; and we are now, in the year of our Lord 1852, to awake from a sleep into which these great lawyers and the whole legislature of those periods fell, and in which all persons ever since have remained, from 1739 down to the time of this argument—for within our time these words have been advisedly left out of the oath in the case of the Jews, by Lord Campbell, in an Act framed by him. I cannot therefore believe this to be a reasonable conclusion. And besides, this argument really goes too far: for its legitimate extent ought to be to exempt Jews from taking any oath of abjuration under any circumstances whatever—seeing that, as it is contended, it is absurd that they should take any oath thus framed, and no other oath is expressly provided for them by the legislature. No one surely can suppose that the legislature intended this result, and indeed Sir *F. Kelly* did not even venture to argue to this extent.

But let us now for a moment concede that there is an absurdity in requiring all such persons under all circumstances to take such an oath, and that under some circumstances it would be impossible to suppose that Jews were to be called on to take it. Then I say that the golden rule only requires us to stop where the absurdity stops. It cannot surely be absurd to say that the legislature may have really intended to require such an oath from all men, Jews or Christians, who take office or pur-

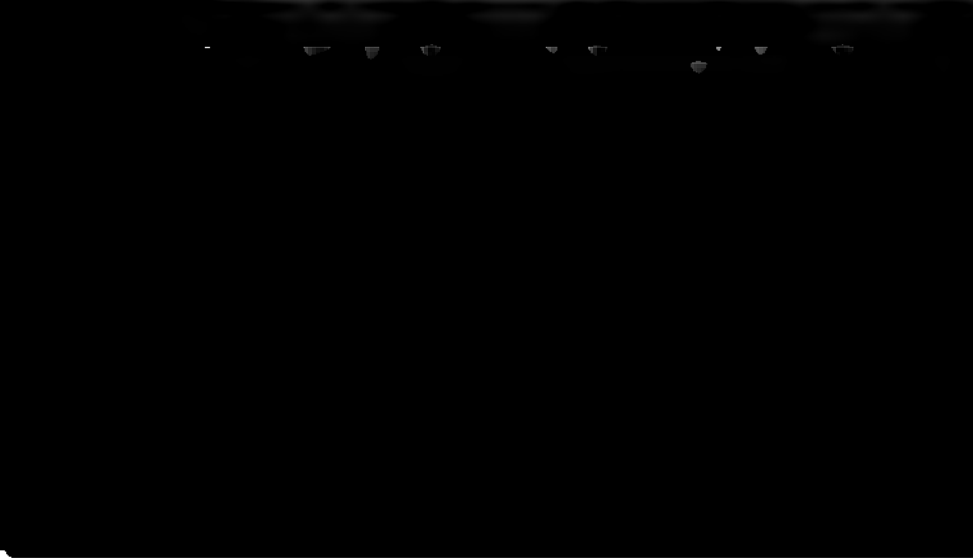
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pose to exercise important legislative functions. If so, then it follows that the utmost that can be done would be to say, that these Acts as to Jews must be in construction confined to the cases of their taking office, or proposing to exercise legislative functions, and that in the other cases alone they are not bound to take the oath at all. But such a construction (even if adopted, which I think would be wrong) could be of no service in the present case.

I am therefore of opinion that these words do form a distinct and essential part of the oath; because they interpret, and give a peculiar and stringent sense to, the previous words of the oath, and are in fact incorporated in and form part of each sentence in that oath, so that without them no part of the oath has exactly the same meaning that it has when they are added to it. I believe that they were advisedly and on great consideration originally adopted, (perhaps on Sir Edward Coke's advice), and that they have been found effectual, and for that reason retained ever since. I think, therefore, that the oath is not taken at all if these words are omitted by the person swearing, and that Mr. Salomons has therefore voted without previously taking the oath of abjuration.

I do most seriously regret, that I am obliged, as a mere expounder of the law, to come to this conclusion—for I do not believe that the case of the Jews was at all thought of



It is to be hoped that some remedy will be provided, for these consequences at least, by the legislature. My duty is, however, plain. It is to expound, and not to make the law—to decide on it as I find it, not as I may wish it to be.

It seems to me that the law on this point is quite clear, and that the judgment must be for the plaintiff.

PARKE, B.—The question of the defendant's liability to penalties for voting in the House of Commons after their Speaker was chosen, and before he, the defendant, had taken the oath required by the 6 Geo. 3, c. 53, though it necessarily occupied much time in the argument, appears to me to lie in a narrow compass.

It depends, mainly, on the construction of that statute giving the form of the oath of abjuration, which every one by the express words of the Act who is required to take and subscribe it, must do, "*according to the form therein set down and prescribed,*" within such time limited, in such manner, and with due observance of the same requisites, and with benefit of the same savings, provisoes, and indemnities, as by any Acts then subsisting are directed and enacted; and in case of neglect or refusal, the statute provides that every one shall be liable to the same penalties and disabilities as are by law established. Those are, with respect to Members of Parliament, the penalties imposed by the 13 Will. 3, c. 6, s. 10, the penalties for which this plaintiff proceeds.

The form of oath is set out in the stat. 6 Geo. 3, c. 53, and is as follows:—

"I, A. B., do truly and sincerely acknowledge, profess, testify, and declare in my conscience, before God and the world, that our Sovereign Lord King George is lawful and rightful King of this realm and all other his Majesty's dominions and countries thereunto belonging. And I do solemnly and sincerely declare, that I do believe in

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my conscience, that not any of the descendants of the person who pretended to be Prince of Wales during the life of the late King James the Second, and since his decease pretended to be and took upon himself the style and title of King of England, by the name of James the Third, or of Scotland, by the name of James the Eighth, or the style and title of King of Great Britain, hath any right or title whatsoever to the Crown of this realm, or any other the dominions thereunto belonging: and I do renounce, refuse, and abjure any allegiance or obedience to any of them. And I do swear, that I will bear faith and true allegiance to his Majesty King George, and him will defend to the utmost of my power against all traitorous conspiracies and attempts whatsoever, which shall be made against his person, crown, or dignity. And I will do my utmost endeavour to disclose and make known to his Majesty, and his successors, all treasons and traitorous conspiracies which I shall know to be against him or any of them. And I do faithfully promise, to the utmost of my power, to support, maintain, and defend, the succession of the Crown, against the descendants of the said James, and against all other persons whatsoever, which succession, by an Act, intituled 'An Act for the further Limitation of the Crown and better se-

The first, and by far the most important one, is, whether the conclusion of this oath is only a part of the ceremony of administering the oath, or a substantive part of the oath itself. The second, of much less consequence, whether, by reason of the oath naming "King George" only, it ceased to be requisite after his death. The third, whether any exemptions were given by any statute in force at the time of passing the 6 Geo. 3; for to such exemptions it is contended that the defendant would be entitled.

The first of these questions, on which it may be truly said that the case almost entirely turns, was ably argued on both sides. It is this:—What is the meaning of the words the legislature have used in the concluding part of the formula of the oath? Are they a part of the oath itself, or merely the mode of administering it? Applying the established rule, and reading them according to their ordinary sense and their grammatical construction, I cannot bring myself to doubt that the words at the end of the oath are to be repeated by the party taking it, and he is to make use of these expressions, "And I do make this recognition, acknowledgment, abjuration, renunciation, and promise heartily, willingly, and truly, *upon the true faith of a Christian:*" nor can I doubt as to the meaning of these words. They cannot possibly mean that the party taking the oath swears that he makes it heartily, willingly, and truly, upon the true faith of any other person *than himself*; they cannot mean that he makes it with as much regard to truth, and with the same degree of faith, that any *other* person, who is a Christian, would do. They must mean that he swears with the true faith of a Christian, *as he himself is*; and therefore none but a Christian can take the oath. This appears to me to be the natural, plain, indisputable sense of the words used, and consequently, unless they are for some just reason to be qualified or altered, the oath must be taken in those very words, which it cannot be except by a Christian. And

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further, *every* person who is enjoined and required to take the oath of abjuration, must take it in the above-mentioned form, by the 6 Geo. 3, c. 53; and by the 13 Will 3, c. 6, s. 10, no member of the House of Commons shall vote in the House of Commons, or sit there during any debate, after the Speaker is chosen, until he has taken the oath in the manner prescribed by the last-mentioned Act. It is impossible that an enactment can be made more distinct and clear, that *every* member of Parliament must take the oath *in the form and manner so prescribed*, or be liable to the penalties—no one, by the express words of the statute, can be excused.

It is however true, that words which are plain enough in their ordinary sense may, when they would involve any absurdity, or inconsistency, or repugnance to the clear intention of the legislature, to be collected from the whole of the Act, or Acts in *pari materiâ* to be construed with it, or other legitimate grounds of interpretation, be modified or altered, so as to avoid that absurdity, inconsistency, or repugnance, but no further, (an instance of which in this Act of Parliament I shall hereafter advert to); for then we may predicate that the words never could have been used by the framers of the law in such a sense: and the main argument of the learned counsel for the defendant was, that if the words in question were read as



every man who is elected to be a member of Parliament is bound to serve, and cannot excuse himself, and this enactment, understood in its ordinary sense, would prevent him from so doing.

Again, it is said, a form of oath with a similar provision, is required by the same statute 6 Geo. 3, c. 53, in all cases where the oath of abjuration is required by existing Acts; and one of them, the 1 Geo. 1, st. 2, c. 13, requires it to be taken, not only by all civil and military officers, schoolmasters, &c., but authorises two or more justices of the peace, or a person appointed by the Privy Council, or by a commission, to tender it to *any* person whom he or they shall suspect to be dangerous or disaffected to his Majesty or his Government; and, upon neglect or refusal, the neglect or refusal is to be certified to the next Quarter Sessions, and the person neglecting or refusing is to be deemed a Popish recusant convict, and as such to forfeit and be proceeded against; and it is said, that it would be a flagrant injustice to construe the oath to apply to persons who were not Christians, and could not therefore take the oath, and that, to avoid that injustice in this *one case*, the latter words ought *in all cases* when the oath is required to be taken, to be construed not to be part of the oath itself. But I think it quite impossible to maintain that there is any absurdity, or any such manifest injustice in the provision that an oath shall be taken in the terms in question, as to justify an alteration of its plain words in the present case. We must construe these Acts of Parliament without allowing ourselves to be influenced by any of the feelings of the present day, as to the proper policy to be pursued with respect to her Majesty's subjects professing the Jewish faith. Looking at these provisions of the legislature *in a judicial spirit*, as I think we are bound to do, how can we say that it is a flagrant violation of natural justice, and a manifest wrong, to make a provision, which has the effect of pre-

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venting all but Christians from being members of the legislature of a Christian country? Whether it is a politic measure or not to exclude them, it is not within our province to inquire, and it would be very wrong in us to offer, or even to hint, any opinion. There is no reason, therefore, on the ground of inconsistency or absurdity, to modify or alter the language of the oath in the case of members of the legislature, which alone is the present question, and the only case in which practically the question is likely to occur. It is therefore unnecessary to consider whether there would be any reason to modify or alter it in the other cases provided for by the 1 Geo. 1, st. 2, c. 13, on the ground of the supposed manifest injustice of exacting an oath from Jews, which they cannot conscientiously take, and, upon their refusing to take it, to punish them as Popish recusants. Such a circumstance would practically never occur. The power given by the statute to two justices of the peace or a commissioner to tender the oath to all such as they or he should deem dangerous or disaffected to the King or his Government, (obviously meaning the abettors, secret and open, of the Pretender), it is highly improbable would ever be exercised against a Jew, or a person not a Christian, who in those times were few in number in Great Britain, and who were very unlikely to be engaged in plots on behalf of the Roman Catholics to subvert the Pro-

The conferring this power in any case was undoubtedly a strong measure as applied to Christians, and was enacted only in consequence of the danger to the Protestant constitution; and though the measure, if enforced against a Jew, who could not conscientiously take the oath, would be one of still greater severity, it is impossible to say it would be so flagrantly unjust as to enable one, judicially, to pronounce an opinion that it could not have been the meaning of the legislature, in such a supposed case, that the oath should be administered in the prescribed form. If it be too severe, it is for the legislature to mitigate its severity, by altering the form of oath—not for us to interpret plain and clear words in a mode directly contrary to their ordinary sense, to avoid what may be thought a hardship. But even admitting that there would be ground for a modification in such an improbable, though possible case, the same reason does not apply to a member of Parliament, the only one now under consideration. There is no absurdity or injustice in requiring an oath which none but a Christian can take from every member of the legislature, and consequently no ground for modifying or altering the terms of the oath as administered to any member in offering to take his seat. *Ad ea quæ frequentius accidunt jura adaptantur.* If in the vast majority of possible cases—in all of ordinary occurrence—the law is in no degree inconsistent or unreasonable, construed according to its plain words, it seems to me to be an untenable proposition, and unsupported by authority, to say that the construction may be varied in *every* case because there is one possible, but highly improbable one, in which the law would operate with great severity, and against our own notions of justice. The utmost that can be reasonably contended is, that it should be varied in that particular case so as to obviate that injustice,—no further. Because it would be hard to impose the oath in the terms prescribed in the case of a Jew suspected of disaffection by two jus-

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tices, is that any reason why it should be altered in *every* other case, though the express words may be insisted on in all such cases—the cases of ordinary occurrence—without any injustice? If we find a single extremely rare case, in which on account of its apparent inconsistency we can judicially predicate that the legislature never meant the oath in its precise terms to be applied, can we conclude that they did not mean it in any other case? I think it clear we cannot. If this argument were to prevail, Roman Catholics themselves would be exempt from taking the full oath, and might legally insist upon the omission of the final words.

It is then contended, that the sole object of the legislature in directing this oath to be taken was to affect Roman Catholic subjects of the realm, not to exclude Jews; and therefore that the enactment ought to be so construed as not to apply to them, which would be effected by holding the last words to be a part of the formula of administration only. It is indeed true as a matter of history, that the occasion of prescribing this particular form of words was the danger which Parliament apprehended from a particular class of Christians, whose loyalty they doubted, and whose sincerity they suspected, and therefore directed this oath to be taken in a manner which afforded a more perfect test of both, and a superior sanction to one in a

ment. The possibility that persons of the Jewish persuasion should be peers, or be elected members of Parliament, probably entered into their contemplation as little as that of Mahometans or Pagans being placed in either category. Both of these are in effect on precisely the same footing in this respect as the Jews, and the argument applies equally to them all.

In enacting a provision aimed at a particular class only of Christians, the legislature have, in the most positive terms, required an oath from *every* member of the legislature which none but a Christian can take, and this enactment must have the effect of closing both Houses of Parliament against every one but a Christian. To alter such strong words, the clearest proof would be required of the intention of the legislature to allow all who were not Christians to be admitted. But a case may be supposed where it might be done. For instance, if it appeared by the terms of the Act itself, or those in *pari materiâ*, that it was, notwithstanding the positive words, the object of the legislature that all, though not Christians, should be admitted—to put the strongest case, supposing that there were a recital in the Act that all persons, of whatever religion, ought to be admitted to Parliament—and directed that an oath should be taken in the form in question, there would be an inconsistency and repugnance in the Act itself in imposing an oath in those precise terms; and then, according to the established rule, to carry the declared intention into effect, and obviate that inconsistency and repugnance, the language of the oath ought to be modified. This must in such a supposed case be held to have been the meaning of the Act, in order to make sense of it. But it is far otherwise in the present case. The express words of the oath necessarily exclude all but Christians, and no intention to include all who are not Christians can be collected from the Act itself, or any other Acts on the same subject or in *pari materiâ*, and none can be collected

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from the history of the times when those statutes were enacted. It would indeed be a startling proposition, that the Parliaments of Queen Elizabeth, William III., and George III., meant all, whether Christians or not, (for they are all on the same footing in this respect), to be admitted to Parliament. As little information can be drawn from the enactment in the 1 Geo. 1, st. 2, c. 13, that persons refusing shall be deemed *Popish recusants convict*, and as such shall forfeit and be proceeded against. This is merely a mode of indicating the class of punishments to which the persons refusing were liable, and which are equally applicable to persons of all religious persuasions. If any argument could be derived from that expression, it would be that the enactment applied to Roman Catholics only; and it would prove too much. It is, however, said to follow, from one of the established rules of construing Acts of Parliament, that the enactment in this case ought to be applied to Christians only, and my Brother *Martin* relies much on this ground. That rule is, that we ought to consider what is the mischief intended to be remedied, and to construe the Act so as to extend the remedy and suppress the mischief. But this rule has, in my judgment, no application to this case. The mischief aimed at no doubt was the admission of a particular class of Christians without a solemn searching and stringent test of their veracity, and

to have ever thought of doing. How can a Judge pronounce that a less stringent measure might have as well carried into effect the immediate object of the legislature, and so construe the clause as to give it that operation only? This would be to depart altogether from the proper duty of a Judge—to alter the law, not to expound it. Such considerations belong to the province of statesmen, not Judges.

I am, for the above reasons, clearly of opinion, that the oath ought to have been taken by the defendant, using the words in question as part of the oath; and, as he did not do this, it is quite unnecessary to decide whether, if he had been willing to do so, and still had insisted that he should be sworn on the Pentateuch, the oath administered in that form would have been sufficient.

The second question arising on the construction of the Act is, whether, as the form of the oath given by the 6 Geo. 3, c. 53, mentions the name of King George only, the obligation to administer it ceased with the reign of that Sovereign, because it was applicable to no other than to him. I think this argument cannot prevail. It is clear that the legislature meant the oath to be taken *always thereafter*, for the enactment is general—that it shall be taken without limit of time—and the oath is not confined to the existing monarch, but mentions “the successors;” and as it could not be taken in those words during the reign of a Sovereign not of the name of George, it follows that the name George is merely used by way of designating the existing Sovereign; and the oath must be altered from time to time in the name of the Sovereign, in the manner it was when actually administered in this case, in order to carry the obvious meaning of the enactment into effect. This is an instance in which the language of the legislature must be modified, in order to avoid absurdity and inconsistency with its manifest intentions. It is to be remarked too, that the legislature, in the 10 Geo. 4, c. 7, s.

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4, recognise the oath of abjuration as that directed by law to be taken, and the constant practice in the late and present reign has been to administer it.

The third question arises upon that part of the section of the 6 Geo. 3, c. 53, which directs the oath to be taken *with benefit of the same savings, provisoes, and indemnities*, as by the Acts before mentioned, or any other Acts, or any part of them, *then subsisting* are directed and enacted.

It is contended for the defendant, that there were statutes which give an exemption to Jews, and which were existing at the time of the passing of the 6 Geo. 3.

The first of these statutes is the 9 Geo. 1, c. 24. It is to oblige all Papists in Scotland, and all persons in Great Britain, of the age of eighteen or upwards, who have not taken the oaths for the security of his Majesty's person and Government required by the 1 Geo. 1, st. 2, c. 13, to take them in one of his Majesty's Courts of record at Westminster, or the General or Quarter Sessions of the county, &c. where they dwell, before the 25th of December, 1723, or to register their names and real estates on or before the 29th of September, 1724, under pain of forfeiture of their estates.

The 10 Geo. 1, c. 4, explains and amends the Act of the 9 Geo. 1, c. 24, extending the time for taking the oath to the end of November, 1724 (viz.)



Geo. 1), the said words “upon the true faith of a Christian” shall be *omitted out of the said oath*, and the taking of the said oath by such persons professing the Jewish religion without those words, in like manner as Jews are admitted to be sworn to give evidence in Courts of justice, shall be deemed to be a sufficient taking of the abjuration oath, within the meaning of this and the said recited Act, (the 9 Geo. 1).

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It is clear that these Acts have no operation at all on the taking of the abjuration oath in Parliament. They apply only to the taking of the oath in Westminster Hall or at the Sessions, with a view of saving the necessity of registering the estates of those who take it, and further, neither was in force at the time of the passing of the 6 Geo. 3, the last having expired on the 24th of June, 1725. I may also observe, that the latter Act, 10 Geo. 1, shews that the legislature at that time thought the words “upon the true faith of a Christian” to be a part of the oath itself, and that persons of the Jewish persuasion were obliged to take the oath with those words; it is therefore a legislative exposition of the meaning of the former Acts. But I do not lay very great stress on arguments derived from legislative expositions. It is, however, a great confirmation of my opinion, to find that the result of the application of the true rules for the construction of Acts of Parliament to this particular case, corresponds with the exposition which the legislature themselves gave to the words in the reign of King George I., when they thought it necessary to make a statutable provision for altering the oath in the case of Jews, and removing the words from it.

In the course of the argument, a reference was made to some Acts, of which a list has been supplied, which it was said had the effect of continuing the 10 Geo. 1, c. 4.

The Indemnity Acts—2 Geo. 2, c. 31; 4 Geo. 2, c. 6; 6 Geo. 2, c. 4; 8 Geo. 2, c. 17; 9 Geo. 2, c. 26; 10 Geo. 2, c. 13; 12 Geo. 2, c. 6; 13 Geo. 2, c. 6; 27 Geo. 2, c. 13;

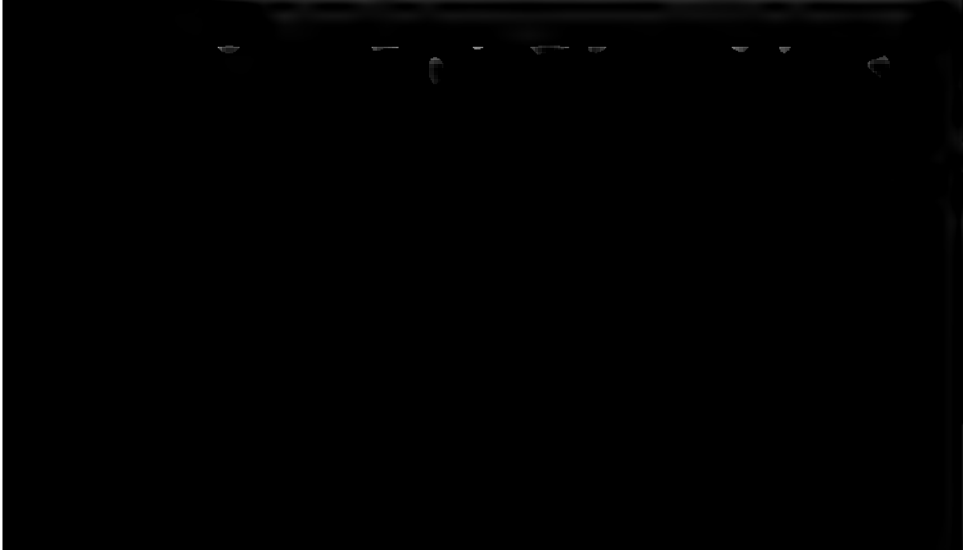
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28 Geo. 2, c. 24; 29 Geo. 2, c. 32; and 6 Geo. 3, c. 7:—the Act of the 3 Geo. 2, c. 29, relating to wills of Papists; 11 Geo. 2, cc. 11, 17; 19 Geo. 2, c. 16; 28 Geo. 2, c. 10; 31 Geo. 2, c. 21; 33 Geo. 2, c. 13; 2 Geo. 3, c. 26; and 4 Geo. 3, c. 38, on the same subject; and the 31 Geo. 3, c. 32, for the relief of Papists from certain disabilities. None of those statutes, nor any others, appear to continue the 10 Geo. 1, c. 4, with respect to Jews, or to have any bearing upon the present question.

Nor does the statute 1 & 2 Vict. c. 105, the Act to relieve doubts as to the validity of oaths, affect the present case. If the words in question were only the mode of administering the oath, the statute would have effect, because the oath was administered in a form and with ceremonies which the defendant declared to be binding. But if they form part of the oath itself, the statute has no application: and I am clearly of opinion that they form part of the matter to be sworn to—that is, part of the oath itself.

I therefore think, and am clearly of opinion, that our judgment must be for the plaintiff.

POLLOCK, C. B.—The facts of this case, and the circumstances under which it comes before the Court for judgment, have already been so fully and distinctly stated



The 6 Geo. 3 requires the oath to be administered in "*such manner and form as is hereinafter set down and prescribed*"; that is to say:" then comes the form of the oath, the concluding part of which is "*upon the true faith of a Christian*:" and the section goes on to enact, that "all and every person and persons who are enjoined and required to administer, take, or subscribe the oath of abjuration, shall respectively *administer, take, and subscribe the oath of abjuration* ACCORDING TO THE FORM HEREIN SET DOWN AND PRESCRIBED &c., *in such manner, and with due observance of THE SAME REQUISITES*, and with benefit of the same savings, provisoes, and indemnities, as by any Act now subsisting are enacted, and subject to the same penalties." Now, by the 16th section of the 1 Geo. 1, no member of the House of Commons shall vote in the House of Commons until he shall take the oath of abjuration in the manner directed; and the penalty of the violation of that section is 500*l.*; and this action is brought to recover that sum, and gives rise to the question I have already stated.

It cannot, I think, be denied (apart from any grounds presented with a view to lead to a different construction) that the plain and obvious meaning of the statute is, that the oath shall be administered and taken according to the *VERY form set down and prescribed in the Act*. But it is said, that clear and substantial grounds for a different construction may be found in the reasons for the decision adopted by my Brother *Martin*.


First, it is said, *Omichund v. Barker* establishes that an oath is to be administered to a *witness* according to the rites of *his* religion, so as to be binding on his conscience, and if it be so, that is sufficient; then it is said, the defendant has taken the substance of the oath in a manner which is legal, being that which is binding on his conscience; and as the object of the statute was not to introduce a religious test, but to ascertain the loyalty of the party called upon to take the oath, and as anybody may be called upon to

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take it, and therefore Jews may be so called upon, and as it would be highly unjust, and therefore very absurd, to require Jews to take the oath in this form, subject on refusal to the very penal consequences contained in the Act, the Act cannot be so construed; but must be so construed as to give an opportunity to them, in common with all her Majesty's subjects, to take the oath in a form in which according to *their* religious belief they can take it.

With respect to the case of *Omichund v. Barker*, it appears to me to have decided merely this—that the common law of England agrees with the law of nations—that “*the form of an oath is to be accommodated to the religious persuasion which the swearer entertains.*” These are the very words of Puffendorf, book 4, c. 2, s. 4. The intercourse of nations must frequently give rise to the necessity of the sanction of an oath in matters that concern both—sometimes with reference to treaties into which they may enter; sometimes with reference to the administration of civil or criminal justice: the sanction of an oath, if valid at the place where taken, ought to be considered valid everywhere; just as a marriage valid at the place where celebrated is (generally speaking) valid everywhere else: and as an oath is the personal act of the party taking it, if a witness be in a foreign land, his oath ought to be re-




relief which he requires—nay, that it is our duty so to construe it—inasmuch as the opposite construction would lead to an injustice amounting to an absurdity. The general argument involved in this course of reasoning is certainly not without some appearance of authority. In some cases (no doubt) limited words in a statute have been extended. The most remarkable instance of this, is the Act commonly called “*Circumspecte Agatis*,” (the 13 Edw. 1, st. 4), in which no bishop is named but the Bishop of Norwich. Lord *Coke*, however, in the 2 Inst. 487, commenting on this says:—“The Bishop of Norwich is here put but for example; but it extendeth to all the bishops within this realm.” The only remark I would make on this is, that if this turns on the mere *construction* of the statute, I do not believe such a construction of a statute would be tolerated in modern times: my own impression is, that the explanation of this very ancient statute—about 100 years only from the time of legal memory—is, that the judges were by that document called upon to enforce as to the Bishop of Norwich that which was the known usage or law of the land previously as to all bishops.

There are other examples, more modern, where what is called a *remedial* law has been extended by what is called “necessary implication,” or “reasonable intendment:” on the other hand, the verbal effect of some clauses in Acts of Parliament has been restrained. Thus, instruments requiring stamps have been received in evidence for collateral purposes, though it is enacted they shall not be “received in evidence;” and other instruments declared to be void “to all intents and purposes,” have been held to be void only so far as is necessary to accomplish the object of the legislature. But, notwithstanding these and other instances that might be put, I very much doubt the soundness of the supposed rule of construction laid down, *when applied to the Acts of the Legislature*. I admit that

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with respect to the written contracts of parties, and the wills of testators, we must endeavour to construe them as well as we can; and if one construction leads to manifest absurdity, and a different construction leads to a sensible result, we are at liberty to reject the construction which leads to the absurdity; but then it must be a "construction," not a "substitution" of something else—either by omitting what is there, or introducing something that is not there. Nor can we reject a will, however unjust we may think it—the absurdity must be something opposed to right reason, and not merely to our notions of policy and justice. But I do not think we are at liberty to use the same freedom with the statutes of the realm. The language of a will must speak for itself, assisted by all external circumstances—the testator cannot explain it: and in the case of a written contract, for wise and sound reasons, the law does not allow it to be explained by parol. But as to the legislature, it continues with ability and wisdom to correct its own errors (if errors they be), to give effect to its own intentions, to enforce its own views; and I think, where the meaning of a statute is plain and clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right, or the contrary. If the meaning of the



what was the real intention of the legislature in making the enactment under consideration, and whether it was not intended *to require the oath to be taken in the very form of words set down*, whatever might be the consequence of the words forming part of the oath.

The earliest statute to which I think attention should be drawn is the 1 Eliz. c. 1, an Act to restore the ancient jurisdiction of the Crown in matters ecclesiastical. By sect. 19 of that Act, all public officers and public servants are to take an oath “according to the tenor and effect following,” as is there stated;—and by the 5 Eliz. c. 1, s. 5, all such persons as are mentioned and set forth in that section are to take and pronounce a corporal oath upon the Evangelists, according to the tenor, effect, and form of the same oath *verbatim*; and by sect. 16 it is enacted, that every knight, citizen, and burgess of the Parliament shall take the said oath.

The stat. 3 Jac. 1, c. 4, s. 15, says, “the tenor of which oath hereafter followeth.” It contains an oath of supremacy and allegiance, concluding with the words “All these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, without any equivocation, or mental evasion, or secret reservation whatsoever, &c., upon the true faith of a Christian.”

Here, I believe, for the first time (as far as I am aware) is found the expression “upon the true faith of a Christian.” Unto which oath so taken, the statute goes on, the person so taking it “shall subscribe his or her name or mark.” Apparently the effect of this statute was to exclude Jews from any benefit that might arise from taking the oath—for they certainly could not take the oath *according to the tenor*, (which is the same thing as *verbatim*), nor subscribe it as so taken. And I think no one can doubt that if it had been pointed out to the legislature of that time, that the effect was to exclude all but Christians from taking the oath, they would have replied that such was their intention.

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By the 7 Jac. 1, c. 6, various persons are to take the oath, amongst others, all knights, citizens and burgesses, and barons of Parliament. I apprehend the effect of these statutes was to exclude from all the offices mentioned in the first statute, and from all the occupations mentioned in the second statute, every person who could not take the oath VERBATIM; and as, by the 6th section of the last Act, all members of Parliament were to take the oath, at this period no Jew could have been a member of the legislature. These statutes remained in force till the 1 Will. & M. st. 1, c. 8, repealed them, and substituted other oaths in their place. And by sect. 12 the oaths thus substituted are to be taken in THESE EXPRESS WORDS. There are then set out the forms of oaths of allegiance and supremacy; in the latter of which the party swearing abjures "the damnable doctrine and position, that princes excommunicated or deprived by the Pope or any authority of the see of Rome, may be deposed or murdered by their subjects or any other whatsoever;" and declares "that no foreign prince, person, prelate, state, or potentate hath or ought to have any jurisdiction, power, superiority, &c. within this realm."

From the 1 Will. 3 to the 13 Will. 3 no oath was required that would exclude Jews from the legislature. But the 13 Will. 3, c. 6, which was passed in 1701, imposed an



enacts that "no person that now is or hereafter shall be a peer of this realm, or member of the House of Peers, shall vote or make his proxy in the House of Peers, or sit there during any debate in the said House of Peers; nor any person that now is or hereafter shall be a member of the House of Commons, shall vote in the House of Commons, or sit there during any debate in the said House of Commons, after their Speaker is chosen,—until such peer or member shall from time to time respectively take the oath aforesaid, and subscribe the same in manner following, (that is to say), the said oath shall be in this and every succeeding Parliament solemnly and publicly made and subscribed, between the hours of nine in the morning and four in the afternoon, by every such peer and member of the House of Peers, at the table in the middle of the said House, before he takes his place in the said House of Peers, and whilst a full House of Peers is there with their Speaker in his place; and by every such member of the House of Commons, at the table in the middle of the said House, and whilst a full House of Commons is there duly sitting, with their Speaker in his chair." And the 11th section imposes the penalty for disobedience to these provisions.

The 1 Ann. st. 2, c. 22, requires the oath to "be administered in *such manner and form as is hereinafter set down and prescribed;*" and by the 2nd section "all and every person and persons, who are enjoined or required to administer, take, or subscribe the oath, shall administer, take, and subscribe the same *according to the form herein set down and prescribed*" &c.

The Act of Union, 5 Ann. c. 8, Art. 22, adapted the oath to the new state of things under the union of the two kingdoms.

The 6 Ann. c. 7, which was passed "for the security of her Majesty's person and Government and of the succession to the Crown of Great Britain in the Protestant line," enacted, in sect. 20, the oath to be taken after the demise of Queen Anne without issue: and it was to be taken

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"upon the true faith of a Christian," the mode of taking remaining the same.

The 6 Ann. c. 14, relates to Scotland. By it suspected persons may be summoned anywhere to take the oath: which is the first clause of that sort.

The 8 Ann. c. 15, makes provision as to taking the oaths there mentioned—and they are to be taken "in the words following" &c.

Having taken this review of the Acts which are in *pari materia* prior to the 1 Geo. 1, I would ask whether it can reasonably be doubted that the legislature,—in using the expression "*verbatim*" in one Act, "*according to the tenor*" in another, "*in these express words*" in a third, and "*according to the form herein set down and prescribed,*" which occurs in the statute in question,—*meant* what the words import? All these expressions really mean the same thing—viz. *that the very words set down were to be used*; and are we at liberty to omit or add anything on account of our notion of what is just or unjust?—and are we to alter the oath so as to accommodate it to the conscience of a Jew, when it is notorious that it was the avowed object of the legislature to exclude even Christians unless they were of one particular denomination? And if this relaxed construction cannot be put on the statutes of Elizabeth of James I. of William III. and Anne, (as I



Persons in Great Britain, refusing or neglecting to take the oaths appointed for the security of his Majesty's Person and Government by several Acts herein mentioned, to register their Names and Real Estates."

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The attention of the legislature was drawn to the hardship of the case of the Jews occasioned by this last Act, and redress was given by an Act which passed the following year—viz. 10 Geo. 1, c. 4. But the redress is limited to the grievance. It was enacted that Jews might, *for the purpose of the Act alluded to*, take the abjuration oath, omitting the words "upon the true faith of a Christian;" and so taking the oath, Jews were not to be required to register their names and real estates. There is nothing that makes the 18th section of the 10 Geo. 1, c. 4, applicable to the 1 Geo. 1: and if that statute were now in force, it would not entitle Jews to take the oath omitting the words "upon the true faith of a Christian" for the purpose of holding office or sitting in Parliament; but every other effect of not taking the oath of abjuration is left untouched. Now, according to the view of my Brother *Martin*—at that very time (for the construction of the Act cannot now be different from what it was then), not only was it unnecessary to pass any Act to relieve the Jews in respect of the registration of their names, but, for any purpose whatever, it was competent not only for a Jew, but for a Turk, a Hindoo, a Pagan, or any other (if by accident he were born within the realm, and was capable of taking any oath binding on his conscience,) to take the abjuration oath, omitting the words "upon the true faith of a Christian," and to be elected and take his seat as a member of Parliament, and to fill any of the offices already alluded to, unless he were kept out by some other test. And as the essence of the matter is said to be *taking the substance of the oath in a manner binding on the conscience*, I think it is not possible to stop short of this—that if a jury found that a Roman Catholic was bound by the oath without the

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words "upon the true faith of a Christian," even he might so take it. I cannot for this purpose discover any difference between a Roman Catholic and a Jew.

So, in the 13 Geo. 2, c. 7, intituled "An Act for naturalising such Foreign Protestants, and others therein mentioned, as are settled, or shall settle, in any of his Majesty's Colonies in America," the 3rd section runs thus:—"And whereas the following words are contained in the latter part of the oath of abjuration, viz. 'upon the true faith of a Christian,' and whereas the people professing the Jewish religion may thereby be prevented from receiving the benefit of this Act, be it further enacted &c. that whenever any person professing the Jewish religion shall present himself to take the said oath of abjuration in pursuance of this Act, the said words 'upon the true faith of a Christian' shall be omitted out of the said oath in administering the same to such person, and the taking and subscribing the said oath by such person professing the Jewish religion without the words aforesaid, and the other oaths appointed by the said Act, in like manner as Jews were permitted to take the oath of abjuration by an Act made in the tenth year of the reign of his late Majesty King George I., intituled" &c. With these Acts before me, and with the legislative commentary upon them which the last two statutes furnish, I think we are not as Judges

religion. The language used appears to me to be so clear, so distinct, so express, and stringent, as to exclude a relaxed (and what may be called a liberal) construction by Judges, quite as much as it is intended to guard against a mental reservation by those who think that the effect of an oath can honestly be so evaded.

On these grounds, I agree with my Brothers *Parke* and *Alderson*, that our judgment ought to be for the plaintiff; and the judgment of the Court is therefore for the plaintiff.

Judgment for the plaintiff.

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ASSUMPSIT.—The second count of the declaration stated that, at the time of the promise thereafter mentioned, Where the master of a vessel sells part of a shipper's

goods at an intermediate port, in order to raise money to provide for the repairs or other expenses of the vessel, which are necessary to enable him to prosecute and complete the voyage, and the vessel does not arrive at her port of destination, the shipper is not entitled to receive the clear value for which the goods would have sold at that port.

A declaration in assumpsit stated, that the defendant was the owner of a certain ship then at a certain foreign port, and bound from thence to the port of London in Great Britain, and that the plaintiff caused certain goods of his to be shipped on board the ship, to be conveyed to London for certain freight; that the ship set sail, and on her voyage was much injured by tempestuous weather; and that the master was obliged to put into an intermediate port to have her repaired; and that, for the purpose of such repairs, and to pay them, and to enable the ship to leave that port, it became necessary for the master to raise a sum of money; and that, without doing so, the ship would have been unable to leave the port or to proceed to sea; and that, because the master could not otherwise raise the amount necessarily required, he sold certain of the plaintiff's goods, and with the amount so realised he paid the expenses of the repairs, &c. The declaration then stated, that the defendant, in consideration of the premises, promised the plaintiff to pay him the value for which the goods would have been sold if they had been delivered by the defendant to the plaintiff at London.

Plea to the declaration, so far as the same claims to recover damages to a greater amount than the value of the ship and freight thereafter mentioned, that the plaintiff ought not to maintain his action to recover any damages to a greater amount than aforesaid, because, after the goods were shipped, and before any part thereof had been conveyed to the port of L., and whilst they were in the custody and under the control of the master, the master wrongfully, and without any authority in that behalf from the defendant, and without his knowledge, privity, or consent, sold the goods, and the defendant thereby was unable to deliver them to the plaintiff; and that, at the several times, the defendant was the owner of the ship, being a British vessel and duly registered; that the goods were shipped by being received into the custody of the master, and that the defendant never personally accepted or received, nor did he interfere with them or the shipping, or the sale, except as such owner of the vessel; and that the shipping and sale took place after the 1st September, 1813; and that the sale was done without the fault or privity of the defendant; and further, that the value of the ship, together with the value of the freight due, or to grow due during the voyage, did not exceed a certain sum (named). Verification, and prayer of judgment.

Held, first, that the declaration was bad in substance; and secondly, that the plea was bad, as being pleaded to the damages merely.

Semble, also, that the plea did not disclose any defence under the 53 Geo. 3, c. 159, upon which it professed to be founded.

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the defendant was the owner of a certain ship called the Harriett then being at a certain port beyond the seas, to wit, at Buenos Ayres, and bound from thence to a certain port, to wit, the port of London, in Great Britain; and thereupon the plaintiffs, on &c., at the request of the defendant, caused to be shipped on board of the said ship at Buenos Ayres divers goods of the plaintiffs (specifying them), to be carried in the said ship by the defendant for the plaintiffs from Buenos Ayres to London, and there to be delivered by the defendant to the plaintiffs or their assigns, for certain freight or reward to be paid by the plaintiffs to the defendant, according to certain bills of lading; and thereupon, afterwards, on &c., the said ship set sail and proceeded on her voyage from Buenos Ayres to London with the said goods of the plaintiffs and certain other cargo on board thereof; and afterwards, and whilst she was so proceeding on her said voyage with the said goods &c., the said ship was, by the violence of the winds and waves, and by means of stormy and tempestuous weather, in the course of such voyage, greatly damaged &c.; and in consequence of the said damage, the master of the said ship was forced and obliged, and did properly and necessarily, to wit, on &c., cause the said ship to put into the port of Monte Video to have the said damage repaired; and the

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proceed to sea; and the said ship, together with the freight to be earned by the said ship, would have been wholly lost to the defendant; and because the said master had not then, and could not otherwise obtain, the said sums of money so necessarily incurred as aforesaid, he did then, for the purpose of raising money as aforesaid, take the said goods of the plaintiffs, and sold the same for the sum of 1200*l.*, with which said sum so realised, together with a certain other sum, to wit, of 3800*l.*, realised by the sale of other goods of the cargo of the ship, by the master in like manner sold, the said costs and expenses so incurred were paid, to wit, by the defendant. And the defendant did then, in consideration of the premises, promise the plaintiffs that he would, on the request of the plaintiffs, pay them the value of the said goods &c. of the plaintiffs so sold as aforesaid, and contracted to be carried and delivered as aforesaid, for which the same might have been sold, had the same been delivered by the defendant to the plaintiffs at the port of London aforesaid. It was then averred, that the value of the said goods, for which the same might have been sold at London, had the same been delivered there to the plaintiffs, amounted, to wit, to 2500*l.*: of all which premises the defendant had notice, and had been duly requested to pay the same, yet the defendant had not paid the same &c. The third and fourth counts were similarly framed.

The defendant pleaded (inter alia) to these counts, so far as the same claim or seek to recover damages beyond or to a greater amount than the value of the ship and freight hereinafter mentioned, that the plaintiffs ought not to maintain their action against him to recover any damages to a greater amount than aforesaid in respect of the said breaches of promise, because the said several goods were so caused to be loaded on board the said ship, at the same time &c., and that afterwards, to wit, on the day and year first mentioned, the said ship sailed on her said voy-

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age from Buenos Ayres to London with the said goods on board, and before she had completed her said voyage, and before any part of her said goods had been carried to the port of London, and whilst the said goods were in the custody and control of the master of the said ship, as such master, for the purpose of being so carried as in the said counts mentioned, the master, to wit, on the occasions of the said sales, wrongfully, and without any authority in that behalf from the defendant, and without his knowledge, privity, or consent, sold and disposed of, as part of the same transaction, the said goods, and then caused and permitted the same to be sold to and carried away by divers persons whose names are to the defendant unknown, at MonteVideo, which is the sale in the declaration mentioned; and the defendant thereby became and was unable to and did not deliver the same to the plaintiffs; and that, before and at the time when the goods were shipped, and at the time of the sale, the defendant was and still is the owner of the said ship, being a British vessel and duly registered; and that the said goods were so caused to be shipped by the same, being put on board and received into the custody of the master whilst the defendant was such owner, and the defendant never personally accepted or received the said goods, nor did he interfere with the said goods or the shipping thereof, or the sale thereof, nor yet, in any way con-

cover any damage beyond the said value of the ship and freight.

Special demurrer to this plea, assigning for causes (*inter alia*) that the plea was not pleaded to the causes of action in the counts mentioned, but to the amount of damages; and that the fact of the sale as alleged being wrongful, and done without the privity of the defendant, was no defence; that the plea amounted to non assumpsit; and that the statute upon which the plea professed to be founded should be specially pleaded.

Joinder in demurrer.

The case was partly argued in last Trinity Term (June 9) (a), and stood over till last Hilary Term (January 19).

J. Wilde, in support of the demurrer to the plea, relied upon the objections raised to it by the demurrer.

Willes contra.—The more important question is, whether the declaration is good in substance. The defendant contends that it is not. The declaration is founded on an executed consideration, and alleges a promise which is not supported by the consideration. No such promise can be implied by law from the chain of circumstances which constitute the consideration. It is stated that the master sold the plaintiffs' goods at an intermediate port on the voyage, for the necessary repairs of the vessel; but the declaration does not contain any averment that the vessel ever arrived at the port of destination. The owner of the vessel is, therefore, not liable to the full extent of the price which the goods would have fetched if the vessel had arrived, although he may be liable for the amount which they actually fetched at the intermediate port: *Richardson v. Nourse* (b). [*Martin*, B.—Might not the promise alleged be supported by shewing that the defendant's agent at

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(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Martin*, B.

(b) 3 B. & Ald. 237.

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the intermediate port had written to the plaintiffs to say that they should receive the full value of the goods?] The liability of the defendant must be taken to arise from the facts alleged. [*Parke, B.*—A past and executed consideration will support no other promise than such as may be implied by law. In *Roscorla v. Thomas* (a) several cases upon the subject are to be found.] No precise authority upon the principal point is to be found in the books; but the opinion of Lord *Tenterden*, as expressed in his work on Shipping, is directly in the defendant's favour. It is there said (b), "If the master, being compelled to take refuge in a foreign port during the course of his voyage, has occasion for money for the repairs of the ship, or other expense necessary to enable him to prosecute and complete the voyage, and cannot otherwise obtain it, he may, as hath been before observed, either hypothecate the whole cargo or sell a part of it for this purpose. In the latter case, if the ship reach the place of destination, the merchant will be entitled to receive the clear value for which the goods might have been sold at that place (c), or he may take the sum for which the goods actually sold, and if he is content to do so he may deduct that sum from the money payable for the freight of his other goods, and this although the owner may have assigned the freight to a third person, and the goods were sold without an urgent

the merchant by the master (a); and Cleirac, Kurick, Valin, and Pothier agree in opinion that the money is, in such a case, due, not only from the master but also from the owners, because it was expended for a purpose, of which they were at all events liable to sustain the charge. But none of the other ordinances contain such a provision; and Emerigon contends, on the authority of the Consolato del Mare, and of the ordinances of Oleron and Antwerp, that the money is only payable in case of the safe arrival of the ship, which was the opinion also of several persons whom Pothier consulted. And this doctrine seems the most reasonable, as the merchant is not thereby placed in a worse situation than if his goods had not been sold but had remained on board the ship. I cannot find that the question ever arose in this country. By the Code de Commerce, the master is to account for the price received, deducting the freight: Art. 298." It appears from this passage that, if the vessel had arrived, the owner of the goods would have had the option of taking either the amount the goods would realise at the port of discharge, or the price they actually fetched. A contract to indemnify the owner of the goods is created by the sale: *Benson v. Duncan* (b). The case is, therefore, similar to one of general average. The owner of the goods ought not to derive a benefit from the misfortune of the owner of the vessel. In *Hallett v. Wigram* (c), the shipowner was held liable to the shipper for the amount which the goods would have fetched at the port of discharge; but there the declaration contained an averment that the vessel arrived at that port. The declaration is, therefore, bad.

Secondly, the plea is sustainable. [*Parke, B.*—I think you will have some difficulty in supporting the plea, as it is

(a) Art. 68. See Emerigon, tom. 2, p. 445, where the several authorities here referred to are cited.

(b) 1 Exch. 537, affirmed on error, 3 Exch. 644.

(c) 19 L. J., C. P., 281.

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merely pleaded to the damages. *Martin, B.*—I doubt whether the plea is good in substance, as it appears to me merely to disclose a lawful mode of borrowing money, and therefore that it does not fall within the 53 Geo. 3, c. 159.] The validity of the loan would depend upon the fact whether the transaction was legal. [*Parke, B.*—The plea is clearly bad upon the ground first suggested; and as it does not deny the statement that the goods were necessarily sold by the master, for the purpose of enabling the vessel to continue the voyage, it would require a strong argument to convince me that that plea brings the case within the 53 Geo. 3, c. 159, and the 7 Geo. 2, c. 15, and 26 Geo. 3, c. 86.]

J. Wilde in reply.—The declaration discloses a good cause of action. The arrival of the vessel at her port of destination is not a condition precedent to the right of the owner of the goods to recover from the owner of the vessel the full amount which the goods would realise at that port. It has been argued, that the present case is analogous to that of general average, and that the sale of the goods, at the most, raises but an implied promise by the defendant to indemnify the plaintiff; and the inference, that such is the nature of the promise, is drawn from *Duncan v. Benson*. But there the master did not sell, but *hypothecated* the goods. *Richardson v. Yau-se-ai*, was also relied upon as shew-

the defendant himself was bound to provide for the expenses which were met by the proceeds of the sale of the plaintiffs' goods. The loan thus allowed by law is compulsory upon the plaintiffs, and is effected for the benefit of the defendant alone; and as the defendant has cut short the adventure as far as regards the plaintiffs, by the sale of their goods, the defendant cannot take advantage of the non-arrival of the vessel. The case, therefore, does not fall within the principles which govern questions of general average. It is a matter which lies entirely between the owner of the goods and the owner of the ship. The latter alone is answerable: *Powell v. Gudgeon* (a). [Parke, B.—Suppose an action of trover were brought against the master for the conversion of the goods. The measure of the damage would be the price the goods actually fetched, unless special damage could be shewn in the loss the plaintiffs had incurred by the goods not having been sold at the port of discharge. But, in that case, would it not be necessary to shew that the vessel did arrive? How would it be possible to calculate the value of the goods at the port of discharge, unless the vessel does arrive?] *Hallett v. Wigram* is an authority in the plaintiffs' favour; for, although it was there stated that the vessel reached the port of destination, that fact is not made the ground of the decision. [Alderson, B.—The owner of the goods is entitled to the amount which they actually fetch, although the vessel does not arrive; but if she does, then he is entitled to that which goods of a similar description would fetch in the market. If that be the law, the owner of the goods does in fact derive an advantage from the sale; for, if the vessel should be lost, he still has the benefit of the sale.] The foreign authorities are not agreed upon this point. By the 22nd article of the judgment of Oleron, Pardessus, Vol. 1, p. 339, mention is made of the arrival of the vessel. The

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(a) 5 M. & Selw. 431.

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price to be paid is the value of the goods at the port of her destination, after the freight has been deducted from that amount. But the arrival of the vessel is not made a condition precedent. In 2 Emerigon, *Treatise on Insurance*, Vol. 2, p. 474, s. 9, it is said, that the Ordinance of Wisbuy, art. 68, contains a singular provision, by which the master has the power of selling part of the goods to raise money for the necessity of the vessel, but that he must repay the merchant, although the vessel should afterwards perish; and it is there said, that Valin and Pothier both agree in the justice of the Ordinance. In 2 Arnould on *Insurance*, 893, after referring to the various authorities upon this question, it is stated that the law of England upon this subject seems to be, "that where goods are sold by the captain in order to raise funds for repairing particular average losses, or for defraying the ordinary expenses of the navigation, the loss arising from their sale must be made good by the shipowner alone, who must, in such case, pay the merchant the price which the goods would have fetched at their place of destination, deducting therefrom the freight which would have been due for their conveyance." If the opinion of the Court should be unfavourable to the declaration, the plaintiffs pray leave to amend.

Cur. adv. vult.



for the necessary purposes of the ship), the plea is bad in form, being a plea to the damages, not to the cause of action. Mr. *Willes*, indeed, found himself obliged to give up the plea, and addressed himself to the declaration; and the only question now is, whether the second count of the declaration is good. The third and fourth stand on precisely the same footing as the second.

The objection to the second count is, that the past consideration alleged does not support the precise promise alleged, no such promise following as a consequence of law from the facts previously stated; for it is argued, that, though the defendant may be bound to pay the price of the goods at the place of sale, or at the port of delivery, at the option of the plaintiffs, yet he is only so bound if the ship arrive at the port of destination; and there is no qualification of that sort alleged in the promise, nor any averment that the vessel did arrive at her destined port of delivery. We think that this objection ought to prevail. The authorities in the English law on this subject are few, and consist of the cases of *Richardson v. Nourse* (a), *Aloys v. Tobin* (b), *Campbell v. Thompson* (c), and *Benson v. Duncan* (d), and Lord Tenterden on Shipping, 372. None of these give countenance to the doctrine that, if a master sell the goods of a shipper at an intermediate port for necessary repairs, the shipper can claim the price of similar goods at the port of delivery, *unless the vessel arrive*; and therefore the promise in this case, which is to pay the value without any such condition, as if the goods had arrived at the port of delivery, does not follow as an inference of law from the premises. In the case of *Hallett v. Wigram*, the vessel had arrived at the port of delivery; it was so averred in the declaration, and the promise to pay the

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(a) 3 B. & Ald. 237.

(c) 1 Stark. 490.

(b) October 30th, 1804, cor.
Lord *Ellenborough*, Abbott on
Shipping, 372.

(d) 1 Exch. 537; 3 Exch. 645,
in error.

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value at that port on request was a correct statement of the promise which the law would infer.

Whether the plaintiff be entitled to recover the price for which the goods actually sold, (which Lord *Tenterden* thinks he cannot unless the vessel arrives, because the merchant ought not to be in a better situation than he would be if the goods had not been sold), is a question that does not arise upon the record as now framed. Our judgment must therefore be for the defendant, for the insufficiency of the declaration. But Mr. *Wilde*, for the plaintiffs, having requested leave to amend if our opinion should be against him, he may do so on payment of costs; otherwise there will be

Judgment for the defendant.

April 21.

MELLERSH v. RIPPEN.

In an action by the first indorsee of a bill of exchange against the drawer, it was proved that the plaintiff wrote a

ASSUMPSIT by the plaintiff, the first indorsee of a bill of exchange for 6*l.* 10*s.* 11*d.*, payable three months after date, drawn by the defendant on J. Hunt. Plea, no notice of dishonour.

At the trial, before *Martin, B.*, at the Middlesex Sittings

for the plaintiff for the amount due, reserving leave to the defendant to move to set that verdict aside, and to enter a nonsuit.

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Lush now moved accordingly.—It is submitted that the notice is insufficient, for it erroneously describes Hunt as the drawer, and the defendant as the acceptor of the bill. In *Beauchamp v. Cash* (a) the following notice—"I give you notice that a bill for &c., drawn by you, lies at &c. dishonoured,"—was held insufficient in an action against the defendant, who indorsed the bill, but did not draw it. In *Shelton v. Braithwaite* (b), which seems to be in the plaintiff's favour, a letter was held to contain a sufficient notice of dishonour, although it shewed neither the amount nor the date of the bill. There the Court held, that it lay upon the defendant to shew that there was more than one bill to which the letter might apply, to render the notice uncertain. But here the letter misdescribes the bill of exchange. [*Parke, B.*—It would not be necessary for the plaintiff to shew that any other bill existed to which this notice could apply.] But the plaintiff is bound to prove a good notice of dishonour.

PARKE, B.—This notice is quite sufficient. It is not possible, under the circumstances, that the defendant could have been misled by it. I therefore think there ought to be no rule.

POLLOCK, C. B., PLATT, B., and MARTIN, B., concurred.

Rule refused.

(a) 1 Dowl. & Ry. N. P. 3.

(b) 7 M. & W. 436.

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The DUKE OF BEAUFORT v. VIVIAN.

April 28.

A declaration in trespass *qu. cl. fr.* stated, that the defendant broke and entered "certain lands of the plaintiff covered with water, being the bed and channel of the river T., and under the same, in the several parishes of L. and L., in the county of G.:"—*Held*, on special demurrer, that the declaration sufficiently described the locus *in quo* by name.

TRESPASS for breaking and entering "certain lands of the plaintiff covered with water, being the bed and channel of the river Tawe, and under the same, in the several parishes of Llansowlet and Llangaveloch, in the county of Glamorgan," and for taking certain coals therein.

Special demurrer, on the ground that the closes in which &c. were not sufficiently designated by name, abutments, or other description, according to the rule of Court.

Joinder in demurrer.

Quain in support of the demurrer.—This declaration, as framed, is in violation of the rule of Court, Hilary Term 4 Will. 4, by which "the close, or place in which &c., must be designated in the declaration by name or abutments or other description, in failure of which the defendant may demur specially." [*Parke, B.*—The plaintiff has clearly followed the rule, for he has described the place by *name* what more could he do?] The river bed as described may be several miles in length. The plaintiff ought therefore to have stated the boundaries or abutments of the locus *in quo*. [*Parke, B.*—The defendant, if he had any real ground for it, might have made a special application upon affidavit

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FLORY v. DENNY.

May 5.

TROVER for a windmill. Pleas: not guilty, and not possessed.

A mortgage of a personal chattel may be made without deed.

At the trial, before *Adams*, Serjt., at the last Suffolk Assizes, the following facts appeared:—One Baker, being the owner of a moveable windmill in Playford, on the 5th of August, 1851, borrowed of the plaintiff 150*l.*, and, as a security, signed the following agreement:—

“Memorandum of agreement made this 5th day of August, 1851, between the undersigned Thomas Flory, of &c., and George Baker, of &c. Whereas the said G. Baker hath this day borrowed and received of the said T. Flory the sum of 150*l.*, for which he has taken of the said G. Baker a promissory note hereunto annexed; and as additional security for that amount, he the said G. Baker doth by these presents agree to assign all his right and interest in a certain windmill standing at Playford, upon land belonging to the Marquis of Bristol, in the occupation of Mr. Biddell, and by their permission and leave standing there during their pleasure as a chattel upon the said land. And I, the said G. Baker, do hereby promise to execute a regular assignment of the said mill, with its going gears and appurtenances, to the said T. Flory, which shall bear date this 5th day of August, 1851, and shall to all intents and purposes be effective and a valid security, in conjunction with the note of hand before mentioned, for the sum therein mentioned; and this agreement shall be effective as to the true intent of the said parties until a more regular assignment be executed. Witness our hands, &c.,

G. BAKER,
T. FLORY.”

On the 6th of October, 1851, Baker, being indebted to

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the defendant in 600*l.*, gave him a warrant of attorney to confess judgment for that amount. Baker continued in possession of the windmill up to the 9th of December, 1851, on which day the sheriff seized it under a writ of *fi. fa.* issued by the defendant on a judgment entered up the previous day on the warrant of attorney. On the 20th of December, a deed of assignment was executed, in pursuance of the above agreement, whereby Baker bargained, sold, and assigned to the plaintiff the windmill in question, with a proviso that the assignment should be void on payment of 150*l.* and interest. On the 3rd of January, 1852, the sheriff executed to the defendant a bill of sale of the windmill, under which he took possession on the following day. On the 20th of January, the defendant received notice that the plaintiff claimed the windmill under the assignment of the 20th of December. The plaintiff, in support of his case, tendered in evidence the agreement of the 5th of August. This was objected to, on the ground that a transfer of goods by way of mortgage could take place only by a delivery, either actual or symbolical, or by an instrument under seal. The learned Judge received the evidence, and a verdict was found for the plaintiff, leave being reserved for the defendant to move to enter a nonsuit.

Reeves v. Capper (a). [Parke, B.—On that subject there is a learned note of my Brother Manning to the case of *Lunn v. Thornton* (b); he says, “With respect to *donationes inter vivos*, gifts by parol are revocable and incomplete until acceptance (i. e. acquiescence in the gift) by the donee; but gifts by deed are perfect and complete, and vest the property in the donee, until disclaimer (which disclaimer may be by parol, Shepp. Touch. 285); and after acceptance in the former case, and until disclaimer in the latter, the property vests in the donee, without any delivery: Perk. tit. ‘Grant,’ 57, 2 Roll. Abr. tit. ‘Grants,’ (X.), Com. Dig. tit. ‘Biens,’ (D. 2)” &c. There are observations to the same effect in a note to the case of *The London and Brighton Railway Company v. Fairclough* (c).] A mortgage is a gift upon condition, and that can only be annexed by deed or on delivery of the chattel. [Martin, B.—In Sheppard’s Touchstone, p. 120, it is said: “And conditions annexed to estates in all the cases before, howsoever they are most frequently and safely made by deed in writing, yet it seems such conditions may be made and annexed to any estate of a thing grantable without deed, without any writing at all.” The law is laid down in similar terms in Littleton, sect. 365.] It is conceded that a condition may be annexed by parol upon delivery of a chattel, as in the ordinary case of a pledge; and the passage referred to does not warrant the assumption, that without delivery the donee can acquire a conditional title.

Secondly, the document in question is not a mortgage, but only an agreement that a mortgage shall at some future time be executed. It is analogous to an agreement for a lease, as compared with an actual lease. It passes no interest, but rests solely in contract. An agreement to lease was never construed as amounting to a demise, unless all the terms of the holding were apparent on the

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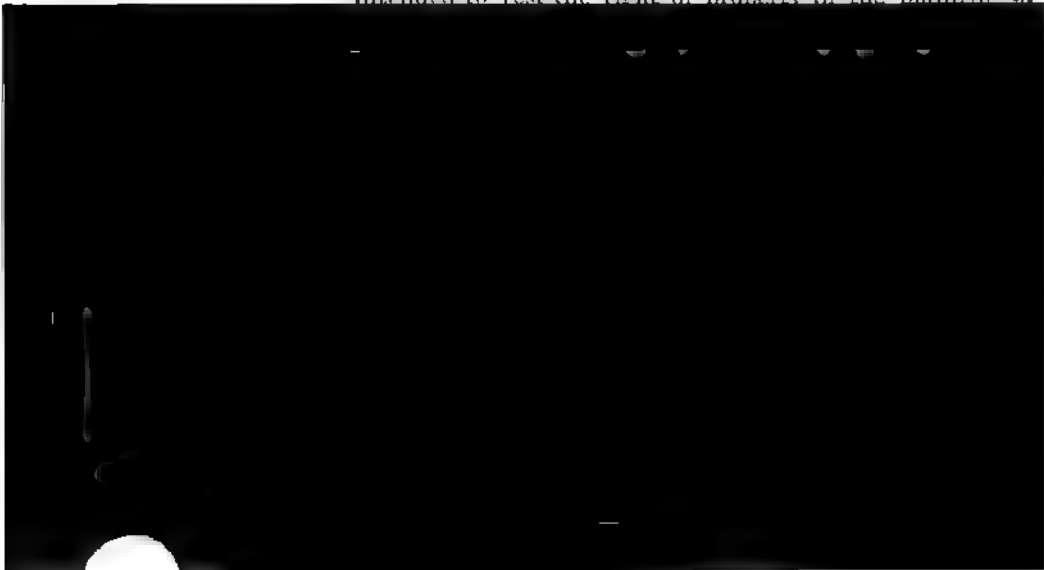
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(a) 5 Bing. N. C. 136. (b) 1 C. B. 381. (c) 2 M. & Gr. 691.

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face of it. Then, applying that rule to the present case, in order to constitute a mortgage there must be an absolute conveyance of the property, defeasible on performance of a condition. But this agreement contains no condition in defeazance of the assignment. [*Parke, B.*—It is an assignment for a valuable consideration, not a mere gift, and defeasible upon payment of the amount for which it is pledged. The word "security" shews that it was intended to operate as a mortgage.] There is a marked distinction between a pledge and a mortgage. In the former case the general property does not vest in the pawnee, but he has a special property only, which enables him to dispose of the pledge on default of payment at the stipulated time, and if he neglect to use that power the general property continues in the pawnor, who may redeem the pledge. A mortgage, however, conveys the entire property to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in him: 1 *Smith's Lead. Cas.* p. 100, *Coggs v. Bernard* (a), 1 *Addison on Contracts*, p. 373, *Vin. Abr.* tit. "Pawn." This agreement is a mere memorandum of pledge, which, provided a delivery had taken place, would have enabled the plaintiff to retain possession until payment: *Harris v. Birch* (b). [*Martin, B.* referred to *Petch v. Tutin* (c).] This instrument was never intended to vest the right of property in the plaintiff so



by deed, and there was no deed in this case. We think that the instrument in question was a mortgage, and that there may well be a mortgage of a chattel without deed. That is clear from the case of *Reeves v. Capper* (a), in which a captain of a ship pledged his chronometer, then in the possession of the makers, to the defendants, the owners of the ship, in consideration of their advancing him 50*l.*, and of allowing him the use of the instrument during the voyage upon which he was about to depart; after the voyage he placed it at the makers, and there pledged it to the plaintiffs, for whom the makers, being ignorant of the pledge to the defendants, agreed to hold it: the money advanced not having been repaid, it was held that the property in the instrument was in the defendants. That judgment was given after consideration, and was delivered by *Tindal*, C. J. The foundation of that decision seems to have been this passage in Littleton (sect. 365), “Also a man cannot plead in any action, that an estate was made in fee or in fee tayl, or for term of life, upon condition, if he doth not vouch a record of this, or shew a writing under seal, proving the same condition (*home ne poit pleder en ascun action, que estate fuit fait en fee, ou en fee tail, on pur terme de vie, sur condition, s’il ne voucha un record de ceo, ou monstra un escript sous seale, provant mesme la condition*). For it is a common learning, that a man by plea shall not defeat any estate of freehold by force of any such condition, unless he sheweth the proof of the condition in writing &c., unless it be in some special cases &c. But of chattels real, as of a lease for years, or of grants of wards made by guardians in chivalrie, and such like &c., a man may plead that such leases or grants were made upon condition &c., without shewing any writing of the condition. So in the same manner a man may do of gifts and grants of chattels personals, and of contracts

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(a) 5 Bing. N. C. 136.

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personals &c." In respect of which, the commentary of Lord Coke is long as to all the other parts, but on the last part, as to chattels real, &c., the commentary is thus—"This is apparent." We may take it, therefore, to be considered clear and beyond doubt. That was acted upon in the case above cited, and therefore there will be no rule.

Rule refused.

April 23.

In re ELIZABETH JONES.

The Vagrant Act, 5 Geo. 4, c. 83, s. 4, does not render a suspected person frequenting a street, with intent to commit felony, liable to punishment, unless the street leads to some river, canal, &c., or is itself a place of public resort, or is adjacent to a place of public resort.

Therefore,

HUDDLESTON moved (April 16) for a rule to shew cause why a writ of habeas corpus should not issue, directed to the keeper of the Westminster House of Correction, commanding him to bring up the body of Elizabeth Jones, then in his custody under commitment as a rogue and a vagabond. The prisoner was committed under the 5 Geo. 4, c. 83, s. 4, which enacts (inter alia) that "every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street

grounds: first, that the commitment did not state that the street frequented by the prisoner was a street leading to a river, canal, &c., or a place of public resort, or a street adjacent to a place of public resort; secondly, that the commitment did not state that the prisoner was in the street in question with intent to commit a felony *there*. *Ex parte Brown* (a), and *Fletcher v. Calthorp* (b), were referred to. The Court granted a rule upon the first point, but intimated their opinion that the second objection was not tenable, as it was enough if the justice was satisfied that there was an intention to commit felony.

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Rule nisi.

On the 22nd of April, the rule was made absolute, no cause being shewn; and on the following day the prisoner was brought into Court in obedience to the writ; and the commitment having been returned and read,

Huddleston moved for her discharge; and stated that a similar question had been before *Patteson*, J., at Chambers, who decided in accordance with the opinion expressed by him in *Ex parte Brown*, though it was at variance with that of the other members of the Court.

No one appeared to support the commitment.

POLLOCK, C. B.—This is an application, upon an habeas corpus, to ascertain whether a prisoner is correctly in custody under a commitment founded on the 5 Geo. 4, c. 83, s. 4. The language used in the commitment is “that she being a suspected person did unlawfully frequent a certain street, called Regent-street, with intent to commit felony.” The intent is right, the character of the person is right, and the question is whether the place frequented is so


(a) 21 L. J., Mag. Cas., p. 113.

(b) 6 Q. B. 880.

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described as to be within the scope of the statute. It literally nothing more than this, that she did unlawful frequent a certain street with intent to commit felony. Then the question is, whether the frequenting of a street by a suspected person is within the Act. I am of opinion that this commitment is not sufficient. A case of *Ex parte Brown* has been referred to, in which Lord Campbell, C., Coleridge, J., and Wightman, J., were of opinion that the commitment was good, but Patteson, J., was of a different opinion. That case differed from this, inasmuch as there the commitment stated that the prisoner frequent a "public highway." I agree, however, with my Brother Patteson that that distinction is not sufficient, and doubt whether I could have concurred in opinion with the majority of the Court. But in this case I entertain no doubt that the commitment is insufficient to satisfy the statute. The language is "or any street, highway, avenue leading thereto, or any place of public resort, any avenue leading thereto, or any street, highway, place adjacent." This commitment does not state that the street in question was a place of public resort, or street, highway, or place adjacent. The word "adjacent" means adjacent to the subject matter referred to, so that to constitute an offence within the Act, the suspected person must be found frequenting a place of public resort.



ion, though at variance with that of the Court of Queen's Bench. I agree that the case of *Ex parte Brown* cannot be distinguished, and that its being there stated that the place was a "public highway" carries the case no further. I think that my Brother *Patteson's* construction of the statute, not only in that case, but in another at Chambers, is the correct construction, and that the Act does not render a person liable to be imprisoned, though a suspected person, from the simple circumstance of his being in a street with the intention to commit felony; but the street must be connected with some river, canal, or navigable stream &c., or it must be a place of public resort, or an avenue leading thereto, or a street adjacent. If the statute had stopped with the words "or any street, highway, or avenue leading thereto," it might have been a question whether this commitment would not be sufficient, because the place in question might be a "street," or an "highway," or an avenue leading to a street." But then the word "street" is again repeated, so that the language cannot be understood in the sense suggested; and the words "leading thereto" must mean leading to some of the places before mentioned, that is, leading to some river, canal, or navigable stream &c. The same construction must be put upon the words "leading thereto," which again occur, for no doubt they have the same meaning in both cases. The clause goes on "or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent." The word "adjacent" overrides the whole, so that the words any street &c. mean any street, highway, or place adjacent to the place of public resort. If the legislature had meant a cul de sac, or a street whether frequented or not, they would have said so. As it is, the statute applies only to places of public resort, or to streets adjacent to places of public resort. In fact, as my Brother *Alderson* has just observed, if a highway is intended, a

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person found in a street, with intent to commit felony, would be liable to be convicted under this Act, though no individual or carriage had been in the street for a week before.

ALDERSON, B.—I agree that the prisoner must be discharged. The object of the statute is to protect places where a great quantity of valuable property is likely to be collected, and which persons of this description are ready to frequent for the purpose of plunder. The legislature, therefore, protects in the first instance rivers, canals, wharfs &c., and the streets and highways leading thereto. Then, having done that, it goes on very naturally to protect another class of places, viz. places of public resort, where the public go with money and other valuable things in their pockets. Then, in the same manner, protection is afforded to the streets and places adjacent thereto. But it would be very wrong to extend the Act further, and say that a suspected person found in any highway, with intent to commit a felony, is liable to be committed as a vagrant. I cannot bring my mind to any such conclusion; and therefore I agree that this commitment is bad, and that the prisoner ought to be discharged.

Prisoner discharged.

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GARBY v. HARRIS.

April 27.

THIS was an action for assault, which was tried before *Talfourd*, J., at the last Cornwall Assizes, when a verdict was found for the plaintiff, with 5*l.* damages; and the learned Judge certified, under the 13 & 14 Vict. c. 61, s. 12, that there was sufficient reason for bringing the action in the Superior Court. Upon this certificate the Master taxed the plaintiff his costs.

Under the 12th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, a Judge has power to certify for costs, where the sum recovered in actions of contract is 20*l.*, and in tort 5*l.*

Collier now moved to review the Master's taxation.—The plaintiff's right to costs depends upon the construction of the 11th and 12th sections of the County Court Extension Act, 13 & 14 Vict. c. 61. The 11th section enacts, "That, if in any action, commenced after the passing of this Act, in any of her Majesty's Superior Courts of Record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum *not exceeding* 20*l.*, or if, in any action commenced after the passing of this Act, in any of her Majesty's Superior Courts of Record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum *not exceeding* 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in cases hereinafter provided, and except in the case of a judgment by default," &c. The plaintiff is not entitled to costs under that section, inasmuch as he has recovered a sum not exceeding 5*l.* Then, by section 12, it is provided, "that, if the plaintiff shall in any such action as aforesaid, recover a sum *less than the sum in that behalf hereinbefore mentioned*, by verdict, and the Judge or other presiding officer, before whom such verdict shall be obtained, shall certify, &c., the plaintiff in such case shall have the same judgment to recover his costs that he would

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have had if this Act had not passed." The sum "thereinbefore mentioned" is 5*l.*, consequently the Judge had no power to certify under that section, as the plaintiff did not recover less than 5*l.* This may be a *casus omisus*, but the Court are bound to give effect to the grammatical construction of the statute, and cannot correct the mistakes of the legislature. [*Parke, B.*—The meaning of the 12th section is, that if the plaintiff does not recover the sum which entitles him to costs under the 11th section, the Judge may certify to give him costs. If the strict grammatical construction leads to an absurdity, the language of the statute may be modified. *Martin, B.*—Though the Court cannot supply an omission, they may read a statute so as to render it sensible and intelligible.] The 37 Geo. 3, c. 111, s. 3, exempted from stamp duty any indenture of apprenticeship, "where a sum or value not exceeding 10*l.* shall be given or contracted with or in relation to the apprentice," and that was held not to apply to cases where no sum or value was given or contracted for: *Rex v. The Inhabitants of Mabe (a)*.

POLLOCK, C. B.—I think there ought to be no rule. I agree that where the language of a statute is perfectly plain, we have no right to alter it in order to correct an error or

section was intended to provide for cases where the sum recovered would not carry costs. What then is the meaning of the words "the sum in that behalf hereinbefore mentioned?" It is clear that they mean, a sum which would carry costs. By so reading the statute, I do no violence to its language, but of two different constructions select the one which appears to me the true meaning of the language of the legislature.

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PARKE, B.—If the statute is to be read according to its strict grammatical construction, Mr. *Collier* is right. But there is a valuable rule which has been acted on for years, viz. that a statute must be construed according to its ordinary grammatical signification, unless such a construction would lead to some repugnance or absurdity, in which case the language may be modified so as to avoid that. This case falls within that rule. In order to make sense of these sections, we must construe them in the manner suggested by the Lord Chief Baron. The words in the 12th section, "the sum in that behalf hereinbefore mentioned," mean, a sum which would entitle the plaintiff to costs; and if a less sum than that is recovered, the Judge has power to certify.

PLATT, B.—These two sections must be read with a candid mind, and a desire to understand the intention of the legislature. No one could imagine that the legislature meant, that where, in actions of contract, the plaintiff recovered 20*l.*, the Judge should not have power to certify for costs; but where the verdict was for 19*l.* 19*s.* 11¼*d.* he should have that power; or if, in actions of tort, the verdict was for 5*l.*, the Judge could not certify, but if it was for one farthing less he might. That being an obvious absurdity, we must give a reasonable construction to the 12th section, and, for that purpose, look to the meaning of the legislature as collected from the two sections read

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together. If the sum recovered exceeds 20*l.* in actions of contract, or 5*l.* in actions of tort, the plaintiff is entitled to costs without the interference of the Judge; but if not, it is in the discretion of the Judge to give costs under the 12th section. It is no answer to say that this is a *casus omis-*
sus, if by reading both sections together we can find out the meaning of the legislature. It is perfectly plain to my mind that the person who penned this Act, instead of using the words "not exceeding," put in the 12th section the words "less than." If the former words be substituted, the meaning is clear. Since then the intention of the legislature is manifest, we ought not to tie ourselves to a literal reading, which would do substantial injustice.

MARTIN, B—I am of the same opinion. Even upon a literal construction of the statute, Mr. *Collier* fails. The language of the 12th section is, "if the plaintiff in any such action as aforesaid shall recover less than the sum in that behalf hereinbefore mentioned:" it is not "recover the sum hereinbefore mentioned," but "the sum *in that behalf* hereinbefore mentioned," which points to the sum which, under the previous section, entitles the plaintiff to costs. I further think that we ought to read this Act of Parliament as we would any other document, with a view to understand



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KEY and Others v. COTESWORTH and Others.

May 8.

ASSUMPSIT for money received by the defendants for the use of the plaintiffs.—Plea, non assumpserunt; upon which issue was joined.

At the trial, before *Martin*, B., at the London Sittings after last Trinity Term, it appeared that the action was brought to recover the sum of 671*l.* 15*s.* 9*d.*, being the proceeds of two cargoes of Indian silk handkerchiefs, consigned by the plaintiffs, merchants at Madras, carrying on business under the firm of Bunny & Co., to the defendants, merchants in London, under the following circumstances, which were mainly admitted on both sides:—In the year 1845, Messrs. Kilgour & Leith, merchants at Glasgow, were desirous, through the defendants, their London agents, of procuring Indian silk handkerchiefs from the plaintiffs at

In 1845 the defendants, commission agents in London, wrote to the plaintiffs, merchants at Madras, as follows:—

“At the request of Messrs. K. & L., of Glasgow, we beg to open a credit in your favour to the extent of 1500*l.*, to be applied to the execution of an order they have given you for Madras handkerchiefs and for cost of which, as pro-

duced, you draw on us at the customary date, on forwarding bills of lading to our order.” In consequence of this letter, two orders given by K. & L. were executed by the plaintiffs, who forwarded the goods and bills of lading to the defendants, and they accepted and paid bills drawn on them in accordance with the letter. In February, 1847, K. & L. wrote to the plaintiffs, inclosing patterns for a third order, and saying, “You will draw for cost, and consign goods as before.” The plaintiffs executed this order, and on the 21st of August shipped the goods on account of K. & L., and sent to the defendants the invoice and bill of lading inclosed in a letter, saying, “We have as usual drawn upon you at six months for the equivalent of the amount of invoice.” The bill of lading stated the goods to have been “shipped by the plaintiffs, and to be deliverable to the defendants or their assigns, on payment of freight.” The invoice stated, that the goods were “consigned to the defendants on account and risk of K. & L.” The letter containing the bill of lading and invoice was received by the defendants on the 26th of August, and the goods arrived in London on the 21st of October. On the same day, the plaintiffs’ agent received a bill drawn against the goods, and caused it to be presented to the defendants for acceptance, but they refused to accept it. On the 27th of October K. & L. stopped payment. The goods were received by the defendants under the bill of lading, and sold, and the proceeds retained by them. On the 4th of March, 1848, the plaintiffs gave the defendants notice that they claimed to stop the goods in transitu, the defendants having refused to accept the bills; and the plaintiffs subsequently brought an action to recover the proceeds of the sale as money received for their use:—*Held*, first, that it was a question for the Judge, and not for the jury, to decide whether, under the circumstances, the property in the goods vested absolutely in K. & L., or merely conditionally on the acceptance of the bill by the defendants.

Secondly, that the contract was not subject to the condition, either precedent or subsequent, that the defendants should accept the bill, but that the property in the goods vested absolutely in K. & L. upon the delivery on board the ship and transmission of the bill of lading to the defendants.

Also, that if the plaintiffs had intended to preserve their right of property in the goods until the bill was accepted, they should have transmitted the bill of lading indorsed in blank to an agent, to be delivered over only in case the bill was accepted.

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Madras; and accordingly, on the 7th August, 1845, Kilgour & Leith wrote to the defendants as follows:—

“ We beg to acknowledge the receipt of your favours of 31st ult. and 5th inst. We find it does not answer your views to execute our friends’ order for India goods. We thought you would have considered this not as an isolated transaction, but as one connected with our account, and that of our friends, whose other business we have directed to come through your house, and which will extend to 12,000*l.* or 15,000*l.* per annum. It certainly will take some time before the first order can be brought forward, but afterwards the same quantity would be required every three or four months. We did not think the liability great, as the goods would of course remain under your control till settled for. However, to save all trouble in the ordering, &c., we have arranged to have the goods made in Madras, and shipped from thence to England; we presume you will take them as a consignment, and on receipt of bill of lading accept for same. We will thank you to say as to this soon.”

In answer to that letter, the defendants, on the 9th of August, wrote to Kilgour & Leith in these terms:—

“ We will answer your proposition respecting the credit for the purchase of Madras handkerchiefs: in the meantime



we providing funds at maturity, or before if re-shipped to the West Indies. We do not intend that the credit we have at present with you shall be made available for this business, we want the handkerchiefs to represent the draft against them till shipped for our friends in the West."

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On the 18th of August, the defendants wrote to Kilgour & Leith in these terms:—

"With reference to the credit you require for the cost of India goods to be ordered from Madras, we are willing to grant it you, knowing the firm to whom you transmit the order: we will send you the necessary letter of credit."

On being informed that the plaintiffs were the persons to whom Messrs. Kilgour & Leith desired the letters of credit to be given, on the 17th of September, the defendants wrote to the plaintiffs as follows:—

"At the request of Messrs. Kilgour & Leith of Glasgow, we beg to open credit in your favour to the extent of 1500*l.*, to be applied to the execution of an order they have given you for Madras handkerchiefs, and for cost of which, as produced, you may draw on us at the customary date, on forwarding bills of lading to our order, and timely orders for insurance."

On the 7th of November, the plaintiffs wrote to the defendants—

"We have the pleasure to acknowledge the receipt of your letter on the 17th of September, handed to us by Messrs. Scott, Bell, & Co., authorising us to draw on you to the extent of 1500*l.*, in execution of an order for handkerchiefs, on account of Messrs. Kilgour & Leith of Glasgow. We shall gladly avail of this authority, shipping the goods to your order, and giving you timely advice, that you may effect insurance on your side."

The plaintiffs accordingly executed the order, and forwarded the goods and bill of lading to the defendants, who received, accepted, and paid the bills drawn on them, in

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accordance with the letter of the 17th of September, to the extent of 1500*l.* therein mentioned; and this transaction was closed.


On the 5th of February, 1847, Messrs. Kilgour & Leith wrote to the plaintiffs as follows:—

“Inclosed are patterns of a third order for handkerchiefs, which we will thank you to have put in hand immediately on receipt. This order has been too long delayed, and if you can by any means hurry execution we shall feel particularly obliged. You will draw for cost and consign goods as before.”

The patterns were inclosed, together with a detail of the order. The goods thus ordered were shipped for England in two vessels, the “Providence,” and the “Essex.” The goods by the “Providence” were shipped on the 21st of August, 1847; and they, as well as the goods shipped in the “Essex,” were stated in the admissions to have been shipped on the said order, and on account of Messrs. Kilgour & Leith.

On the same day (21st of August, 1847) the plaintiffs wrote to the defendants as follows:—

“By the desire of our mutual friends, Messrs. Kilgour & Leith, of Glasgow, we beg to hand you herewith invoice and bill of lading for nine cases Madras handkerchiefs, shipped on the “Providence” (Captain S. Hicks, to name



the defendants on the 26th of October in due course. The bill of lading, which bore date the 21st of August, was as follows:—

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“Shipped in good order and well conditioned, by Bunny & Co., (the plaintiffs) in and upon the good ship called the “Providence,” whereof is master for this present voyage, Hicks, and now riding at anchor in the Roads of Madras, and bound for London.

³ S. 34 and 47, two cases.	} Madras Handkerchiefs.
³ S S. 42 and 46, four do.	
¹ S S S. 31 and 33, three do.	

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London (the act of God, the king's enemies, &c. excepted) unto Messrs. Cotesworth, Powell, & Pryor, or to their assigns, they paying freight for the said goods on delivery, at the rate of 6*l*. 12*s*. 6*d*. per ton of fifty cubic feet, with primage and average accustomed.”

The invoice was as follows:—

“ Madras, 21st August, 1847.

“ Invoice of nine case of Madras handkerchiefs, shipped by the undersigned, (Bunny & Co. the plaintiffs), on board the “Providence,” Captain Hicks, consigned to Messrs. Cotesworth, Powell, & Pryor, on account and risk of Messrs. Kilgour & Leith, Glasgow.” [Then followed a list of the cases and prices.]

The goods by the “Essex” were shipped on the 9th of October. A bill of lading, indorsed in blank by the plaintiffs, and an invoice substantially in the same form as the above, were inclosed in a letter from the plaintiffs to the

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defendants, dated the 12th of October, and which was received by the defendants on the 22nd of November. This letter was as follows:—

“By desire of our mutual friends, Messrs. Kilgour & Leith, of Glasgow, we have the pleasure to hand you herewith invoice and bill of lading for eight cases, Ventapollam handkerchiefs, shipped in the Essex, Captain W. N. Howard, to your care, and we have as usual drawn upon you at six months for the equivalent of the amount of invoice in 302*l.* 13*s.* 8*d.*, being at the current exchange of 1*s.* 11½*d.* per rupee, and which will doubtless meet due honour. We leave the insurance to be effected on your side.”

On the 27th of October, Messrs. Kilgour & Leith stopped payment. The goods by the “Providence” arrived in London on the 21st of October, the goods by the “Essex” on the 3rd of March, 1848. Both parcels were received by the defendants under the bills of lading, and both were sold by them, and the proceeds, amounting to 671*l.* 15*s.* 9*d.*, sought to be recovered in this action, received by the defendants. Messrs. Kilgour & Leith were before and at the time, and still are, indebted to the defendants on a balance of account in a larger sum.

On the 21st of October, Scott, Bell, & Co., the plaintiffs’



consequence of the insolvency of Messrs. Kilgour & Leith, of Glasgow, on whose account they shipped the undermentioned goods, they claim to stop the said goods in transitu. We understand that bills of exchange were drawn by Messrs. Bunny & Co. upon you in payment of the invoice cost of these goods, and that you have refused to accept these drafts, but still have a wish to retain the property. Messrs. Bunny & Co. are advised, that as you have thus refused to fulfil the terms upon which the goods were consigned to you, and as the goods themselves never have reached the insolvent house, on whose behalf they were shipped, the transitus is not at an end, and the right of stoppage still subsists. The goods, therefore, are claimed on behalf of Messrs. Bunny & Co., who are willing, and we hereby offer on their behalf, to pay you any claim for freight or otherwise, which you may legally have upon the goods. We give you this notice preparatory to such steps being taken on behalf of Messrs. Bunny & Co. as may be advised to be proper to enforce the delivery of the property; and it is conceived, if there be any question of the right of stoppage in transitu, there can be no doubt that you can have no right to retain the property when you refuse to honour the bills drawn against such property. Messrs. Bunny & Co. have remitted the triplicate bills of lading, &c., and Messrs. Kilgour & Leith's original letter of orders."

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The defendants refused to deliver up the goods or accept the bills, or to pay the invoiced price. The plaintiffs thereupon commenced the present action. On behalf of the plaintiffs it was contended, that the sale of the handkerchiefs was subject to a condition, either precedent or subsequent, that the defendants should accept the bills; and they having refused to do so, the condition precedent was never performed, and the property and right of possession remained in the plaintiffs. That, at all events, the sale

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was subject to the condition subsequent, that the defendants should accept the bills, and if not, the property should revert; which condition having been broken, the plaintiffs thereby became entitled to the goods or their proceeds. And that, whether the sale was on a condition or not, was a question of fact for the jury. On the part of the defendants it was contended, that the sale was not on condition, but an absolute sale; that, upon the shipment of the goods, accompanied by the transmission of the bills of lading to the defendants, the property and right of possession vested absolutely in Messrs. Kilgour & Leith; and that, if the plaintiffs had any remedy against the defendants, it was by an action for not accepting the bills. And that whether or no it was a sale on condition, was a question of law for the Judge, and not one of fact for the jury. The learned Judge was of opinion that there was no question for the jury, and nonsuited the plaintiffs.

Sir *F. Thesiger*, in the following Term, obtained a rule nisi to set aside the nonsuit and for a new trial; against which

Knowles and Willes shewed cause (a).—The plaintiffs cannot maintain this action, unless they were the owners of the goods at the time of their sale. It is submitted

Lickbarrow v. Mason (a). Since, then, the plaintiffs could not have maintained trover if the bills of lading had been negotiated, how can they now recover the proceeds of the sale as money received for their use? The acceptance of the bills by the defendants was not a condition precedent to the vesting of the property in Kilgour & Co. In *Wilms-hurst v. Bowker* (b), a quantity of wheat was sold, to be paid for by banker's draft in London, at two months, to be remitted by the vendee on receipt of the invoice and bill of lading; and it was held in the Exchequer Chamber, reversing the judgment of the Court of Common Pleas, that, by the delivery of the wheat on board a vessel for the account and at the risk of the vendee, and the transmission of the bill of lading indorsed by the vendor, the latter had parted with his property and right of possession, and could not stop the wheat in transitu, on failure of the vendee to remit the banker's draft. So here, the plaintiffs, by the transmission of the bills of lading, have enabled Kilgour & Co. to deal with the goods as their own. If the plaintiffs had intended to retain any control over the property, they should have indorsed the bills of lading specially, or have sent them to their agents, with the bills of exchange annexed. But the bills of lading were received by the defendants before the plaintiffs' agents received the bills of exchange, which shews that they were never intended to be simultaneous acts. The property vested absolutely in Kilgour & Leith, and the plaintiffs' remedy (if any) was by an action against the defendants for not accepting the bills. [*Parke, B.*—Is not the fact of the bills of lading being accompanied with that stipulation, evidence for the jury that the plaintiffs did not intend the property to pass unless the bills were accepted?] There was nothing for the jury to determine, because there was no evidence from which they could infer a condition either precedent or

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(a) 2 T. R. 63.

(b) 7 M. & Gr. 882.

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subsequent. If any condition exists, that forms part of the contract, and it is for the Court to determine its meaning, and say whether it is conditional or not: *Hutchinson v. Bowker* (a), *Neilson v. Harford* (b), Taylor on Evidence, Vol. 1, p. 42. Here all the facts admit of but one construction, viz. that the property was intended to vest absolutely in the consignees. *Howes v. Ball* (c), and *Brandt v. Bowlby* (d), are instances of conditional contracts. In the cases relied on by the other side, the conduct of the parties was at variance with what the terms of the document implied, and that afforded evidence of a condition.

The *Attorney-General* (*Montague Smith* with him) in support of the rule.—It was for the jury to decide what was the nature of the contract, which, it is submitted, was conditional only; and without performance of the condition, viz. the acceptance of the bills, no property passed to the consignees. It is important to consider the previous transactions between the parties, since the letter of the 5th of February, which contains the order in question, refers to them in these terms:—"You will draw for cost, and consign goods *as before*." It is conceded that, if the contract depended entirely on written documents, the Court, and not the jury, would have to determine its meaning. But



the form of the bill of lading and language of the invoice are not conclusive, but that it is the province of the jury, looking to all the circumstances, to determine what is the nature of the contract. [*Martin*, B., referred to *Turner v. The Liverpool Dock Company* (a).] The original transaction depends upon the letter of credit of the 17th of September, 1845. Kilgour & Leith had corresponded with the defendants for the purpose of inducing them to become responsible for the payment of the goods, which the plaintiffs would not have supplied unless the due payment were secured by the acceptance of the defendants. Therefore, so far as respects that transaction, it was conditional. The drawing was to be "against the consignment," which is a well understood mercantile expression. Whether it was a condition precedent, defeating the transfer, or a condition subsequent, revesting the property on breach of it, was a question to be determined by the jury; and in coming to a conclusion on that point, they should have considered what had taken place with respect to the previous consignments, which were satisfied. In *Wilmshurst v. Bowker* (b), Lord Abinger, C. B., says, "We accede to the general principle laid down by the Court below; and if the facts had been before a jury, we are not prepared to say that they might not have drawn the inference that the remitting of a banker's draft was a condition precedent to the vesting of the property in the wheat in the plaintiffs."

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B. [After stating the facts, his Lordship proceeded:]—It was contended at the trial, on behalf of the plaintiffs, that the sale of the handkerchiefs was a sale on a condition, either precedent or subsequent, that the defend-

(a) 6 Exch. 543.

(b) 7 M. & Gr. 882.

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ants should accept the bills drawn on them in respect of the handkerchiefs; that, upon their refusal to accept, the condition precedent was never performed, and the property in the handkerchiefs never passed out of the plaintiffs, and that they were therefore entitled to them or their proceeds; and that, if this were not so, at all events it was subject to the condition subsequent, that the defendants should accept the bills, and, if not, the property should revert, which condition was broken; so that thereby the plaintiffs became entitled to the goods or their proceeds: and whether the sale was on a condition or not, was a question for the jury, and ought to have been left to them. On the other hand it was contended, on behalf of the defendants, that it was not a sale upon a condition at all; that it was an absolute sale by the plaintiffs to Messrs. Kilgour & Leith; and that, upon the shipment of the goods by the plaintiffs on account and risk of Messrs. Kilgour & Leith, followed up by the transmission of the bills of lading to the defendants—one bill of lading making them the consignees, and the other the indorsees—the property and possession absolutely vested in Kilgour & Leith, and these goods thereby became theirs, and were at their sole risk, and they alone were entitled to them and their proceeds; and that, if the plaintiffs had any right of action against the defendants, which on their part was denied, it was

sale to Messrs. Kilgour & Leith was an absolute, not a conditional one; that the property vested in them upon the delivery on board the ship, and the transmission of the bills of lading to the defendants; and that the plaintiffs could not maintain the present action against the defendants, who have received the goods and disposed of them under the authority of Kilgour & Leith, and could not bring an action for the proceeds; and, by his direction, the plaintiffs were nonsuited.

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We are of opinion that the ruling of the learned Judge was correct. We think that the question, what was the contract between the parties, was, in this case, entirely one of law for the Judge to decide upon; nor was there any evidence of usage to which the letters refer, which would be matter to be left to the jury. Looking at the written documents alone, the learned Judge was quite right in the view he took at the trial, that the property vested by the transmission of the bills of lading in the manner described to the defendants, with the invoices at the same time. If it had been the intent of the vendors to preserve their right in that property until the bill drawn against it was accepted, he ought to have transmitted the bills of lading indorsed in blank to an agent, to be delivered over only in case the acceptance took place. Having delivered them without that qualification, the property vested in Kilgour & Leith, or the defendants as their agents. Our judgment in this case is in conformity with that of the Court of Exchequer Chamber in the case of *Wilmshurst v. Bowker* (a); but there is a passage in the judgment of Lord Abinger which was much relied on by the learned counsel for the plaintiffs. The circumstances of the two cases are very similar, and Lord Abinger stated, that, if the facts had been before a jury, he was not prepared to say that they might not have drawn the inference that the remitting of the

(a) 7 M. & Gr. 882.

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banker's draft, the mode of payment agreed on in that case, was a condition precedent to the vesting of the property. In that case, there may have been some particular facts to go to the jury, but at all events it was only the obiter dictum of Lord Abinger. It is sufficient to say, for the reasons before given, we think that, in this case, there was no question of fact as to the contract to be submitted to the jury. Several other cases were cited on collateral points, to which it is unnecessary to refer. The rule is therefore discharged.

Rule discharged.

April 29.

MAGUIRE v. KINCAID.

Where to a plea of nul tiel record the plaintiff replies tiel record, a two days' notice that he will produce the record is sufficient.

THIS was an action on a judgment, to which the defendant pleaded nul tiel record. On the 24th of April, the plaintiff replied, tiel record; and on the same day delivered the issue, with notice that he would move for judgment upon production of the record on the 26th of April, which was the dies datus in the replication. On the 26th of April, the defendant was served with a rule for judg-

a notice by the plaintiff that he will produce his own record; and the defendant has only to come and see that it proves the issue.

Rule refused.

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BARBAT v. ALLEN and Another.

April 15.

ASSUMPSIT for work and labour &c.—Pleas: non assumpserunt, and that the defendants were induced to make the promise by fraud and covin.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after Michaelmas Term, 1851, the plaintiff's case was proved by a witness who had acted as the agent of the defendants in making the contract in respect of which the work in question was done. The defendants' counsel then proposed to call the wife of the defendant Allen to prove fraud, by the admissions of this witness in her presence. It was objected by the plaintiffs' counsel, that the 14 & 15 Vict. c. 99 (a), had not rendered the wife a competent wit-

The 14 & 15 Vict. c. 99, has not rendered a wife a competent witness for or against her husband in civil proceedings.

Whether the testimony of a wife is admissible if the objection to her competency be waived, *quære*.

But where the objection is taken, and the Judge thereupon rules

that the evidence is inadmissible, although the counsel for the opposite party is afterwards willing to waive the objection, the Judge is not therefore bound to admit the evidence.

(a) The following are the material sections:—

Sect. 1, repeals so much of the 6 & 7 Vict. c. 85, as provides that the said Act shall "not render competent any party to any suit, action, or proceeding, individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognisance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part."

Sect. 2. "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the Court, on behalf of either or any

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ness; and the learned Judge being of that opinion, refused to admit her testimony. Subsequently, the plaintiff's counsel offered to waive the objection; but the learned Judge, notwithstanding, refused to receive the evidence; and a verdict was found for the plaintiff.

Giffard, in the following Term, obtained a rule nisi to set aside the verdict, and for a new trial, on the grounds, first, that the above statute had rendered the wife a competent witness; secondly, that, if not, her testimony ought to have been received when the objection was waived.

Hertslet now shewed cause.—Prior to the 14 & 15 Vict. c. 99, it was a settled principle of law that husband and wife were incompetent as witnesses for or against each other. In *Hall v. Hill* (a), which was an action for wages earned by the plaintiff's wife, *Raymond*, C. J., refused to allow an admission by the wife, that she had received 20*l.*, to be given in evidence against the husband. [*Platt*, B.—That was an admission by an unauthorised agent.] In *Davis v. Dinwoody* (b), Lord *Kenyon*, C. J., said, “Independently of the question of interest, husbands and wives are not admitted as witnesses either for or against each other; for, being so nearly connected, they are supposed to have such a bias on their minds that they are not to

other." In Buller's *Nisi Prius*, p. 286a, it is said that "husband and wife cannot be admitted to be witness for each other, because their interests are absolutely the same, nor against each other, because contrary to the legal policy of marriage." The 14 & 15 Vict. c. 99, has made no alteration in this respect. Since the passing of that Act, Lord *Truro*, C., in delivering judgment in *Percival v. Caney* (a), said, "The long established rule of law is, that a wife cannot be examined for or against her husband; and no alteration has yet been made in that established rule of law. It is a rule founded on a principle which is more valuable even than the administration of justice—the necessity of preserving the confidence and happiness of domestic life." [*Pollock*, C.B.—We all agree that, if the objection be taken, a wife is not admissible as a witness.] Then her testimony could not be received, even though the objection was waived. The consent of counsel cannot overrule the discretion of the Judge. The Court is bound to reject a document improperly stamped, notwithstanding the parties consent that it shall be received. Suppose the parties agreed that the witnesses should not be sworn, could the Court admit their testimony? In *Taylor on Evidence*, sect. 995, it is said, "Whether the rule may be relaxed so as to admit the wife to testify against the husband *by his consent*, the authorities are not agreed. Lord *Hardwicke* was of opinion that she was not admissible, even with the husband's consent; and this opinion has been followed in America." Reference is there made to *Barker v. Dixie* (b), where, in an action for a malicious prosecution, the defendant was willing that the plaintiff's wife should be examined; but Lord *Hardwicke* said, "The reason why the law will not suffer a wife to be a witness for or against her husband, is to preserve the peace of families; and there-

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(a) Court of Chancery, 26th January, 1852. (b) Cas. tem. Hardw. 264.

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fore I shall never encourage such a consent." In *Starkie on Evidence*, vol. 2, p. 549, it is said, "So important is this rule, that the law will not allow it to be violated even by agreement; the wife cannot be examined against her husband, although he consent; and the principle is further preserved by adhering to the rule even after the marriage tie has been dissolved by the death of one of the parties, or by a divorce for adultery." [Parke, B.—In *Pedley v. Wellesley* (a), *Best*, C. J., offered to admit the evidence of a wife against her husband, if the husband would consent; and he said, "Lord Mansfield once permitted a plaintiff to be examined with his own consent. Some of the Judges doubted the propriety of that permission; but I thought that it was right." The case alluded to is *Norden v. Williamson* (b), and "Lord Mansfield" seems to be a mistake for "Chief Justice Mansfield."—*Martin*, B., referred to *Worrall v. Jones* (c).]

H. Giffard in support of the rule.—The 14 & 15 Vict. c. 99, has rendered a wife a competent witness for or against her husband. The third section provides, that husband and wife shall not be competent witnesses against each other in *criminal cases*. Now, there are two familiar rules as to the construction of statutes: "expressio unius est exclusio alterius," and "the words of a statute are to be

abolished all objection by reason of interest, except in the case of parties, the first section of the 14 & 15 Vict. c. 99, repeals that exception, and so removes the incompetency of the wife, which arose from her interest being identical with that of her husband. Lord *Coke* describes husband and wife as “*duæ animæ in carne unâ*.” Co. Litt. 6. b. The objection is not founded on any supposed sacredness of the conjugal relation, otherwise husband and wife could not be examined for and against third persons. In *Annesley v. The Earl of Anglesea* (a), a wife was examined as to whether her husband was worthy of credit on his oath. In *O'Connor v. Marjoribanks* (b), where the personal representatives of a deceased husband brought trover for some plate, and the widow was held incompetent to prove that she had pledged the plate with the defendant by the authority of her husband, on the counsel arguing that the admission of such evidence would violate the sacredness of conjugal communication, *Maule, J.*, said, “The rule can hardly stand upon that ground. If the question had arisen between third parties, the widow might clearly have been called to prove that she had pledged the plate with her husband’s consent, or by his authority.” [*Pollock, C. B.*—I do not assent to that. The rule is, that, so far as the law can, it does respect those relations; but it cannot do so in all cases; as, for instance, where husband and wife are not parties to the suit.]—Then with respect to the other point: a person may waive a law made for his benefit. Besides, here the wife was called to prove an independent fact unknown to her husband.

PARKE, B.—The rule ought to be discharged. If the Court were called upon to form an opinion, whether, when a party objects to the competency of a wife as a witness against her husband, and then offers to waive the objec-

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(a) 17 How. St. Tr. 1276.

(b) 4 M. & Gr. 435.

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tion, the Court should interpose, and, as ministers of justice, refuse to allow it, I should pause before I concurred with my Lord Chief Baron. In this case, however, my Lord at first rejected the witness as incompetent, and it would not have been right afterwards to allow her to be examined because the objection was waived. With respect to the main question, I am clearly of opinion that a wife is not a competent witness in a civil suit in which her husband is a party. She was incompetent by the common law,—I do not stop to inquire whether on the ground of interest, or on what other ground,—and when we look at the statute 14 & 15 Vict. c. 99, it is clear that it was never meant to render a wife a competent witness for or against her husband. The 6 & 7 Vict. c. 85, “for improving the law of evidence,” enacts, “that no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every

dividually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognisance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively," &c. So that this Act has repealed all objections on account of interest, except in the cases of the persons enumerated in the proviso. Then the effect of the first section of the 14 & 15 Vict. c. 99, is to render competent a portion of those persons, but not all. It repeals so much of the proviso of the former Act, as declares that nothing in it shall "render competent any party to any suit, action, or proceeding individually named on the record," &c. And the 2nd section renders competent the parties to a suit. But it leaves out of that category the husbands and wives of the litigant parties, and consequently they remain as incompetent as before. The only colourable argument in favour of the defendant is that founded on the language of the subsequent section, by which it is provided, perhaps unnecessarily, that nothing therein contained shall, "in any criminal proceeding," render any husband or wife competent or compellable to give evidence for or against each other. It is argued that from those negative words we are to imply the affirmative, viz. that they are to be competent in civil cases. I think we ought not. Possibly the third section is not worded as it ought to have been; but no doubt the legislature contemplated that, in the ordinary course of things, husband and wife would be more likely to be offered as witnesses for or against each other in criminal proceedings, and therefore, in order to guard against that, declared that they should not be competent in such cases. This is not the first time that I have had occasion to consider the point. Immediately after the Act passed, I gave

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it a great deal of consideration, and am satisfied that it was never intended to make a wife a competent witness for or against her husband.

PLATT, B.—I am of the same opinion, and for the same reasons.

MARTIN, B.—I am of the same opinion. The provision in the third section, which is relied on, is nothing more than what constantly occurs. During the passage of a bill through Parliament, it is suggested that some evil or inconvenience may result from a particular enactment. Then it is said, that shall be provided for, so that no possible objection can arise. The presence of a clause thus introduced ought not to be made the foundation of an argument in construing the statute. In the present case, the wife was called and the objection made; and I think the Lord Chief Baron was right in rejecting her evidence. The counsel for the plaintiff then withdrew the objection, but his Lordship said in substance, "you need not do so, for I am convinced that I am right." If the question had been as to the general right of counsel to waive an objection to inadmissible evidence, I agree with my Brother *Parke* that it would be a matter for consideration.



there is room for the maxim "*expressio unius est exclusio alterius*;" but the first section goes the other way; and, in my opinion, the inference deducible from that section is stronger than the inference to be drawn from the third. Therefore I think that the wife was not admissible.

With respect to the other point, in my opinion, a Judge is bound to administer the whole law of evidence; and although a practice has crept in of admitting inadmissible evidence by consent, still that is a matter for the discretion of the Judge. The cases which have been adverted to with reference to waiving the objection to an interested witness scarcely apply; for, strictly speaking, all objections to the competency of a witness, on the score of interest, ought to be taken on the *voir dire*, before the witness is sworn. Therefore, in those cases where persons have been examined by consent, although they had an avowed interest, it was only going back to the old law; and after the witness was sworn, there was, in truth, no objection to waive. I think that it is in the discretion of the Judge whether he will admit the evidence objected to; otherwise, if the parties agreed that a witness should give his evidence unsworn, or if a person openly declared himself an atheist, I do not see why those persons might not be examined. The consent of the parties will not entitle them to use an affidavit which is inadmissible. Some additional light may be thrown on the subject by this circumstance,—that when parties are to be examined in a Court of law, under an order of a Court of equity, the order is positive that the witnesses shall be examined, which would be useless unless the Court had power to reject them notwithstanding the consent of the parties. I think that the Judge, in his discretion, has a right to insist on the law of England being administered; and, when any departure from it is proposed, to say to the parties, "You shall not make a law for yourselves." I agree, however, that this

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rule ought to be discharged, inasmuch as the witness was incompetent, and, upon the objection being taken, the Judge so decided; and after that it is too late to contend that the witness ought to have been examined.

Rule discharged.

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April 26.

To a declaration in trespass for breaking and entering a close

TRESPASS.—The declaration stated, that the defendants broke and entered a certain close of the plaintiff, called of the plaintiff called the stable, and breaking the doors thereof, and for seizing and carrying away divers goods and chattels of the plaintiff therein, the defendant pleaded, under the 11 Geo. 2, c. 19, s. 1, that, at the time when the trespasses were committed, one O. O. was tenant of certain premises to the defendant at a certain rent, and that half a year's rent was then due to the defendant from the said O. O., and in arrear and unpaid; and that, within thirty days before the said time when &c., O. O. fraudulently and clandestinely conveyed from the premises held by him as such tenant, the goods and chattels in the declaration mentioned, being the proper goods and chattels of the said O. O., in order to prevent the defendant from distraining them for the rent in arrear; and that, because the said goods and chattels so fraudulently and clandestinely conveyed by O. O. still remained in the said close in which, &c., and were there locked up, to prevent them from being seized as a distress for the said arrears of rent, the defendant, whilst the rent remained due, and within thirty days after the said goods and chattels had so been clandestinely and fraudulently conveyed and locked up, entered the said close, in order to seize and take the said goods and chattels as a distress for the said arrears of rent so due, and did at the time when, &c., and within thirty days after the said goods and chattels had been so conveyed as aforesaid, seize them as a distress for the said arrears of rent, and took, because of the said trespass, the said goods and chattels as a distress and

the stable, in the county of Carnarvon, and broke open, pulled down, and damaged two doors of the plaintiff, of and belonging to the said close, and then broke and spoiled divers locks of the plaintiff belonging to the said doors, and then seized divers goods and chattels of the plaintiff, to wit, five horses &c. therein, and then took and carried away the same, and converted them to the defendants' own use, &c.

The defendants pleaded, first, not guilty; secondly, that the said close, doors, &c., were not the plaintiff's, modo et formâ; thirdly, that the goods and chattels were not the plaintiff's, modo et formâ. Upon these pleas the plaintiff joined issue.

The defendants pleaded, fourthly, to the whole declaration, that one Owen Owens for a long time, to wit, for the space of half a year next before and ending on the 1st day of September, 1850, and from thence until and at the said times when &c., held and enjoyed a certain water corn-mill and premises, situate in the parish of Aber, in the county of Carnarvon, under and by virtue of a certain demise thereof theretofore, to wit, on the 1st day of September, 1849, made by the defendant E. G. Roberts to the said O. Owens, for the term, to wit, of one year from thence next ensuing, and so on from year to year, and so long as the said defendant and the said O. Owens should respectively think fit, at and under the yearly rent of 130*l.*, payable half-yearly by even and equal portions, the reversion thereof, to wit, in fee, then and still belonging to the defendant the said E. G. Roberts; and further, that, on the day and year first aforesaid, a large sum of money, to wit the sum of 65*l.* of the rent aforesaid, for half a year of the said term, ending on the same day and year, became and was due and payable from the said O. Owens to the defendant the said E. G. Roberts, and at the several times when &c. was in arrear and unpaid; and that the said O. Owens, after the said rent became and was due and payable, and whilst

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the same was actually due, in arrear, and unpaid, and within thirty days next before the said several times when &c., fraudulently and clandestinely conveyed and carried off and from the said premises so held and enjoyed by him as such tenant thereof as aforesaid, the said goods and chattels in the said declaration mentioned, being the proper goods and chattels of him the said O. Owens, in order to prevent the said defendant from distraining the same for the said rent so before and at the time of the said removal actually due, in arrear, and unpaid as aforesaid; and for that purpose conveyed the said goods and chattels in the said declaration mentioned to the said close in which &c.; and because the said goods and chattels, which had been so fraudulently and clandestinely conveyed away and carried off by the said O. Owens as aforesaid, still remained and were in the said close in which &c., to which the same had been so conveyed as aforesaid, and were there kept locked up, so as to prevent them from being seized and taken as a distress for the said arrears of rent, the said E. G. Roberts in his own right, and the said other defendants as the servants of the said E. G. Roberts, and by his command, afterwards, and while the said rent so remained due, in arrear, and unpaid as aforesaid, and within thirty days next after the said goods and chattels

tels so there found as a distress for the said arrears of rent, the same then remaining due, in arrear, and unpaid ; and because, on the occasion aforesaid, the said goods and chattels had been and were put and kept in the said close in which &c., locked up, so as to prevent them from being taken or seized as a distress for the said arrears of rent, and so that the defendants could not, without breaking open and entering the said close, seize the said goods as aforesaid, the defendant E. G. Roberts in his own right, and the other defendants, as bailiffs of the said E. G. Roberts, and by his command, on the occasion and at the time aforesaid of entering and taking the said goods in the said close, were forced and obliged to and did, in order to seize the said goods as aforesaid, first calling to their assistance the constable of the place where the said close and goods were, according to the form of the said statute, and with his aid and assistance, in the day-time, break open and enter the said close, in order to take and seize, and did then as aforesaid take and seize, the said goods and chattels for the said arrears of rent, according to the said statute; and in so breaking and entering the said close did, to a small and necessary extent, commit the supposed trespasses, so far as they relate to the said doors, locks, &c.; and the defendants, on the occasion aforesaid, did no unnecessary damage, and no more than was necessary to enable them to seize the said goods as aforesaid, for the purposes aforesaid.—Verification.

Special demurrer to the fourth plea, on the grounds (inter alia) that it was improperly pleaded to the whole declaration; that the statement in the plea, that the goods and chattels were the property of the said Owen Owens, was inconsistent with the allegation in the declaration, that they were the plaintiff's; and that it amounted to an argumentative traverse of the goods mentioned in the declaration being the plaintiff's as therein alleged.—Joinder in demurrer.

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The case was argued in last Hilary Term (Jan. 19) by

Cowling (*Welsby* with him) in support of the demurrer —The fourth plea, which professes to be framed under the 11 Geo. 2, c. 19, is bad in form and in substance. First, as to the question of form: the plea amounts to an argumentative denial that the goods seized were the goods of the plaintiff. If, on the other hand, the plea should be taken to admit that the goods were the plaintiff's, in that case it is no answer to the action. *Fletcher v. Marillier* (a) is an express authority that the plea amounts to an argumentative traverse. Lord *Denman*, C. J., in delivering the judgment of the Court in that case, says, "The justification asserts that the goods were the property of one Stent; that they had been fraudulently removed by him from a house which he held as tenant to the defendant, in order to avoid a distress for rent in arrear; and that they had been placed in the plaintiff's house with her privity and consent, against the form of the statute; and then goes on to justify entering the house in order to seize the goods, and the seizing them under the provisions of 11 Geo. 2, c. 19, s. 7. If by this plea it be meant to deny that the goods, at the time of the seizure, were the goods of the plaintiff, the denial is plainly indirect and argumentative, and the plea is bad for that reason, which is assigned as cause of

to admit that, at the time of the seizure, they were the goods of the plaintiff, not being the tenant." [*Parke*, B.—It is not necessary under the statute, that the goods should be the tenant's at the time of the seizure, although they must be so at the time of the removal, to give the landlord the power of distraining them. For if the goods have been transferred by gift, or have even been the subject of a sale not made *bonâ fide*, the landlord has a right to seize them.] The plea does not give the plaintiff any colourable title to the goods, but leaves it altogether in dubio whether the goods were his or not: 2 Wms. Saund. 84 e, note (e). The plea is therefore informal. [*Martin*, B.—The defendant could not have given this defence in evidence under a traverse that the goods were the goods of the plaintiff.]

Secondly, the plea is bad in substance. By the 7th section of the 11 Geo. 2, c. 19, a landlord can upon certain conditions only seize goods fraudulently and clandestinely removed from the demised premises. The statute expressly requires the concurrence of two things, to give the landlord this right: first, it must be shewn that the goods have been unlawfully removed; and secondly, that they have not been legally sold. The second section provides, that no landlord shall seize goods "which shall be sold *bonâ fide* and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid." This section imposes a condition precedent upon the landlord's right of distress. The defendant, therefore, should have distinctly shewn that the goods were not so transferred before the seizure. In 1 Wms. Saund. 233 b, note (d), it is laid down, that "a proviso is properly the statement of something extrinsic of the subject-matter of a covenant, which shall go in discharge of that covenant by way of defeasance; an exception is, a taking out of the covenant some part of the subject-matter of it. If these be right definitions, the plaintiff need never state a proviso, but must always state an exception." It

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therefore lies upon the defendant to shew that the transfer of the goods was illegal. Where, in answer to an action on a bill of exchange, the defendant pleads that it was illegal in its inception, and that the plaintiff took it without value, to which the plaintiff replies *de injuriâ*, the illegality being proved, the onus is cast upon the plaintiff of proving that he gave value: *Bailey v. Bidwell* (a). In *Thornton v. Adams* (b), it was held that the plea must shew that the goods removed were the tenant's at the time of the removal. The plea is also bad, because it does not contain any statement that the plaintiff in any way participated with the tenant in the illegal removal or custody of the goods. It must therefore be taken that the plaintiff was ignorant of the fact, and that he was not a party to the transaction. The plea does not even state that the goods were placed on the plaintiff's close by his consent. In *Fletcher v. Marillier* (c), *Rich v. Woolley* (d), and *Angell v. Harrison* (e), the pleas severally contained an allegation to the effect that the plaintiff was a participator in the illegal act of the tenant. The third section shews that the legislature intended to punish the tenant who defrauded his landlord, and the party assisting him; but they never could have meant that the statute should thus affect an innocent party.

In the next place, as it must be presumed that the plain-

required; but if it is capable of being construed in favour of this position, it ought to receive such an interpretation: *Harper v. Carr* (a).

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Willes, contra.—First, as to the objection that the plea is bad by reason of its omitting to state that the plaintiff participated in the act of the tenant, and in support of which position several cases are cited in which such an averment has been introduced into the plea; the answer is, that the statute does not require such an averment. The third section imposes a distinct penalty upon the tenant who fraudulently removes his goods; and in case of a third party wilfully aiding the tenant, it imposes upon him a like penalty. But the enactments of the statute give the landlord the power of following the goods upon the premises of any person, whether he participate or not with the tenant in the fraud upon his landlord.

Secondly, it is said that there ought to have been a demand of admittance. But the statute contains no provision whatever which requires a demand to be made. The 7th section enacts, that it shall be lawful, “in the case of a dwelling-house, oath being first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein, in the day time to break open and enter into such house, barn, stable, outhouse, yard, close, and place, and to take and seize such goods and chattels, for the said arrears of rent, as he, she, or they might have done, by virtue of this or any former Act, if such goods and chattels had been put in any open field or place.” It may be admitted that a sheriff, in order to execute process of the law upon the defendant, or his property removed there to avoid an execution, must demand admittance before he can lawfully break the outer door of a *dwelling-house*: *Ratcliffe v. Burton* (b), *Hutchinson v. Birch* (c). But in the present case, the steps which are to be taken in making

(a) 7 T. R. 270.


(b) 3 Bos. & P. 229.

(c) 4 Taunt. 627.

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the distress are expressly pointed out by the statute. [Parke, B.—Suppose goods are placed upon a person's land without his privity, can the landlord follow the goods and enter the premises by violence for that purpose without having first requested permission to do so?] He may under this statute. In Viner's Abridgement, title "Trespass" (I. a.), it is said, "If a man takes my goods and carries them into his own land, I may justify my entry unto the said land to take my goods again; for they came there by his own act." *Patrick v. Colerick* (a) is to the same effect. [Parke, B.—A trespasser may be followed upon his own land, but the difficulty which presses me is, whether the statute gives the power of going upon the land of an innocent party. What remedy would the party have?] If he has taken no share in the transaction, his remedy will be against the party who deposits the goods upon his property.

Thirdly, it is said that the plea ought to have shewn that the plaintiff was not a bona fide purchaser for a valuable consideration, within the second section of the Act. But if the plea had contained such a statement, it would have amounted to an argumentative denial of the goods being the plaintiff's. The second section comes by way of proviso, and the plaintiff, if he can bring his case within it, ought to make it the subject of a replication. *The Bank v. ...*



plea, under a traverse of the goods being the plaintiff's. The property in the goods is not changed by the distress: *Samuel v. Duke* (a). The plea does not require express colour: *Doctor Lëyfield's case* (b).

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Cowling was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was argued before my Lord Chief Baron and my Brothers *Alderson*, *Martin*, and myself, at the Sittings in last Term. The declaration was in trespass. [His Lordship, after stating the pleadings, proceeded:] This plea admits that the goods seized were, at the time of the seizure, the goods of the plaintiff, as averred in the declaration, but justifies that seizure on the ground that the same goods had been, within thirty days before, fraudulently carried off by the tenant, being his own goods, from the demised premises to prevent a distress for rent, and locked up on the plaintiff's close; and it avers the locks to have been broken in the presence of a constable.

The question on general demurrer is, whether this plea states a good *primâ facie* case within the enactment of the 11 Geo. 2, c. 19, s. 1. We think it does. If goods of *the tenant* are fraudulently conveyed away, they are by that section made liable to a distress within the period of thirty days, to whatever place removed. By the general terms of the section, liability attaches to the particular goods themselves, not merely so long as they continue the goods of the tenant; and then the next section, which states by way of proviso that no landlord shall take or seize goods as a distress, which have been *bonâ fide* sold for a valuable consideration to persons not privy to the fraud, operates as a defeazance of the provisions of the former section, and takes all goods so sold out of its oper-

(a) 3 M. & W. 622.

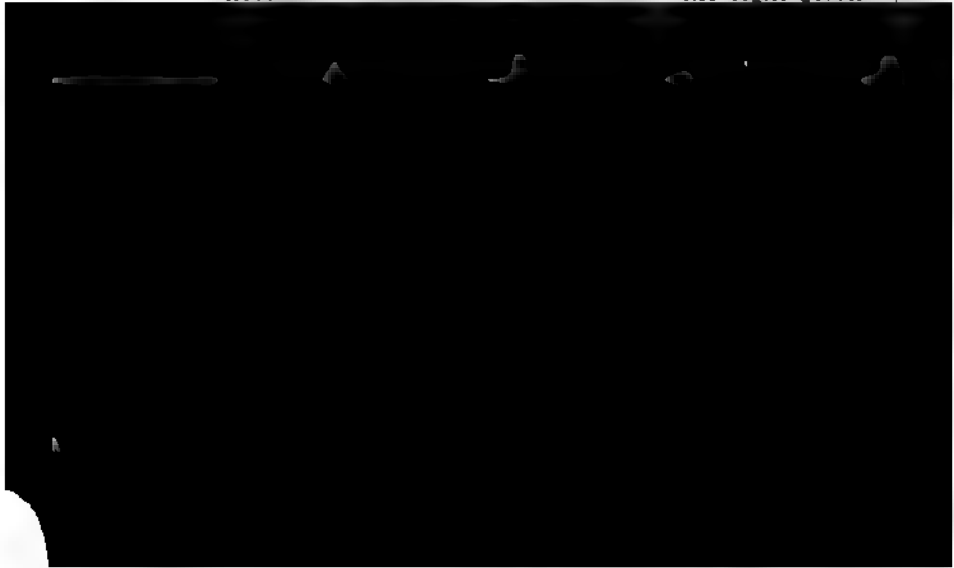
(b) 9 Rep. 405.

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ation. If the plaintiff fell within that category, he ought to have so replied, according to the rules of pleading. And a reason for this enactment being made in the shape of a proviso is, that the plaintiff knows his title to the goods better than the landlord; and the defendant ought not to be called upon to plead as part of his justification that they were not so sold. In the absence of such a replication, the plaintiff must be taken to have been either merely in possession of the goods, or a bailee, or to have been a donee without value; and therefore the liability of those goods to distress still continued.

But it was then contended, that the plaintiff's close could not be entered, and, still more, his locks could not be broken, unless he was a party to or at least conusant of the fraudulent removal of the goods; for it would, it was said, be a hardship on him if innocent, and if the goods were locked up without his privity or knowledge in his close, that his locks should be broken; and further, that it could not be a justifiable act to break open his gates without a previous request to open them; and though the statute in express words requires neither one circumstance nor the other, one or both must by implication be deemed necessary, on the plain principles of justice.

We do not think that either of these circumstances were necessary conditions to the exercise of the right given by



condition to the exercise of this power, that the landlord should prove the privity of the person in possession of the goods, it might be very difficult to do so, or to ascertain that within the period allowed to distrain; and then the remedy would be of little value. Again, if the gate of a field could not be broken open without a previous request to open it, it may easily be conceived that a great impediment would be interposed, by the necessity of searching for and finding the occupier in order to make a request; and as it rarely happens that the occupier of the field would be innocent, the statutory provision is by no means on the whole unjust; and the presence of the peace officer is a protection against any excess. Besides, if the plaintiff were really innocent of all collusion with the fraudulent tenant or person placing the goods on his close, he would have a remedy against that person for the damage sustained by the act of the landlord. We think therefore that the plea is good on general demurrer.

The grounds of special demurrer are also insisted on. The first ground is, that the statement that the goods were those of the tenant is inconsistent with the allegation in the declaration, that they were the plaintiff's, and so an argumentative traverse; and if the plea admits the goods to be the plaintiff's, then the right to distrain did not exist, because it applies only to cases in which the tenant removes his own goods. But this is a misapprehension. The plea admits the goods to be the plaintiff's at the time of *seizure*, and avers that they were the tenant's at the time of *removal*, in which there is no inconsistency whatever. Both may be perfectly true. There is, therefore, no such dilemma as suggested in the special demurrer.

From some passages in the judgment of Lord *Denman*, in the Queen's Bench, in *Fletcher v. Marillier* (a), (if the report be correct), it would appear, that the difference between the

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(a) 9 Ad. & E. 461.

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time of *removal* and of *seizure* was not adverted to; but the case itself is distinguishable, as the plea admitted the goods *at the time of seizure* to be the property of and in the possession of the tenant, and no colour of title was given to the plaintiff; and that is pointed out as a cause of special demurrer, and also relied upon in the judgment. Our judgment is therefore for the defendant.

Judgment for the defendant (a).

(a) See the following case.

April 26.

THOMAS v. WATKINS.

To an action of trespass for breaking and entering the plaintiff's house and seizing his goods, the defendant pleaded that one Thomas held a house as tenant to one Payne, at a certain rent; that the rent was in arrear; that the said goods, be-

TRESPASS for breaking and entering the dwelling house of the plaintiff, and for seizing his goods.

Plea, under the 11 Geo. 2, c. 19, that one E. Thomas held a certain house as tenant to one Payne, at the yearly rent of 65*l.*; that the rent was due and in arrear from Thomas to Payne; that the said goods, being the goods of Thomas, were fraudulently and clandestinely conveyed away by him from his said dwelling house, to prevent Payne from distraining them, and were, with the consent and privity of the plaintiff, placed in the plaintiff's dwelling house, where-

Willes in support of the demurrer.—The replication is bad for the reasons assigned. If the plaintiff had traversed either allegation, and the defendant, on the trial, were to fail in the proof of the allegation so traversed, the plea would not be supported. The replication is therefore double.

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Prideaux contra.—The plaintiff might have replied de injuriâ to this plea, as is clear from the case of *Bowler v. Nicholson* (a). There the plaintiff himself was the tenant, and the replication was held insufficient, on the ground that the plea alleged an authority given by law, which was explained by *Patteson*, J., to mean an authority which must be mediately or immediately derived from the plaintiff. In the present case, the relationship of landlord and tenant does not exist between the plaintiff and the defendant. These parties are mere strangers. Now, the replication de injuriâ would have put in issue all the material allegations in the plea. The plaintiff is, therefore, at liberty to traverse any one or more of the material allegations: *Garten v. Robinson* (b). [*Martin*, B.—When a particular formula is given, can the pleader depart from it? In *Sutherland v. Pratt* (c), it was held that a defendant cannot separately traverse an allegation which would be put in issue by a plea of the general issue.] In *Chadwick v. Herapath* (d), it was held, that where a plaintiff may reply generally, denying the whole of a plea, he is at liberty to deny any part of it. [*Parke*, B.—The defendant had better withdraw his demurrer, and join issue upon the replication. *Pollock*, C. B.—The inclination of the opinion of the Court is in favour of the replication.]

Willes elected to amend on the usual terms.

(a) 12 A. & E. 341.

(c) 11 M. & W. 296.

(b) 2 Dowl. P. C., N. S., 41.

(d) 3 C. B. 885.

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May 1.

LANDMAN v. ENTWISTLE.

In an action by an engineer against a provisional committeeman of a Railway Company, it appeared that, at a meeting of the committee, at which the plaintiff was present, it was resolved, "that the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the Company, and that no such responsibility shall attach to them." At another meeting, at which the plaintiff was also present, a resolution was passed, which

ASSUMPSIT for work and labour, &c.—Plea, non assumpsit.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after last Hilary Term, it appeared that the action was brought to recover the sum of 616*l.* 18*s.* 4*d.*, claimed by the plaintiff for his services as the engineer of a projected railway company, called the Kentish Railway Company, of which the defendant was one of the provisional committee. On the part of the plaintiff the following documentary evidence was adduced. On the 7th of October, 1844, the plaintiff wrote to the secretary of the Company as follows:—"Having now made all the necessary trials, sections, and inspections of the country along the line between Gravesend and the proposed western terminus, I think it desirable that no time should be lost in calling a meeting of the committee, in order that they may adopt the necessary measures for providing the funds indispensably required for carrying on the final surveys, and completing the parliamentary documents."

At a meeting of the committee of management on the 17th of October, 1844, at which the plaintiff was present,

of his assistant, Mr. Pinhorn, until there should be sufficient funds of the Company to meet any demand he might be entitled to make."

At a meeting of the committee of management on the 29th of October, 1844, one of the resolutions was as follows: "And it appearing to the committee that it is absolutely necessary to provide a fund, in order that the surveys of the line may be immediately proceeded with, it was (on the motion of Mr. Entwistle)—Resolved, that the committee bind themselves to be answerable to the extent of 1000*l.*, to be applied to engineering and surveying purposes."

At a meeting of the committee of management on the 18th of November, 1844, after stating that negotiations had been entered into with the South Eastern Railway Company, to carry into effect the projected Kentish Railway, it was resolved—"That, having now an assurance from the South Eastern Railway Company that they will endeavour to obtain the authority of Parliament, and that, if authorised by Parliament, they will construct a line of railway through North Kent to Canterbury, similar in its general course to that proposed by this Company; and having an engagement from them to reimburse to this committee the expenses hitherto incurred, this committee are of opinion that it is expedient that the Kentish Railway Company should withdraw from this undertaking in favour of the South Eastern Railway Company."

At a meeting of the provisional committee on the 28th of November, 1844, at which the defendant was present, one of the resolutions was "That B. Greene, J. Blyth, John Entwistle (the defendant), the trustees for this Company, be a committee for determining and settling the liabilities of this Company, and for receiving from the South Eastern Railway Company, under the arrangement entered into with them, the money requisite for discharging such liabilities."

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On the 18th of November, 1844, the solicitors of the Kentish Railway Company wrote to the plaintiff as follows:—"We are desired by the committee of management to inform you that they have made arrangements, by means of which their projected line of railways through North Kent to Canterbury will be executed by the South Eastern Railway Company, and to request that you will furnish them, as early as possible, with a statement of the expenses incurred on the authority of the committee in reference to the Kentish Railway."

On the part of the defendant the following documents were given in evidence:—At a meeting of the provisional committee on the 12th of August, 1844, to which the defendant was a party, and at which the plaintiff was present, one of the resolutions was: "That the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the Company, and that no such responsibility shall attach to them." Another of the resolutions at the same meeting was:—"That it be a recommendation to the committee of management to endeavour to secure the valuable services of J. Locke, Esq., the eminent engineer, in addition to those of Colonel Landman, the original projector of the railway, it being clearly understood that neither of these gentlemen shall



perfectly ready to continue to devote my time and attention to the perfecting of the survey and getting up of the parliamentary documents, without making any charge for the same until sufficient funds may have been collected."

The scheme was abandoned in pursuance of the arrangement entered into with the South Eastern Railway Company, and the deposits on shares, which amounted to 4168*l.*, were returned to the subscribers. It was submitted on the part of the defendant, that, under the above circumstances, he was not liable, inasmuch as the contract was that the plaintiff should be paid out of the profits of the undertaking. The learned Judge, being of that opinion, directed a nonsuit, reserving leave for the plaintiff to enter a verdict for him, if the Court should be of opinion that he was entitled to recover.

A rule nisi having been obtained accordingly,

The *Attorney-General* (*Hoggins* and *Smythies* with him) shewed cause.—The plaintiff was cognisant of the resolutions of the 12th of August, 1844, and consented to act on those terms; consequently he has no remedy against the individual members of the provisional committee. It will probably be argued, that the deposits on shares were intended to form a fund available for all necessary expenses, and that the charges for engineering are of that description. But it is clear that the deposits were not a fund out of which the plaintiff was ultimately to be paid. They were intended to provide for petty cash expenses, necessarily incident to the promotion of the scheme, and were never designed to include heavy charges, such as those of the surveyor or engineer. The shareholders were entitled to have their deposits returned as soon as the undertaking was abandoned: *Ashpitel v. Sercombe* (a); therefore there was no fund available for the plaintiff's claim. The

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(a) 5 Exch. 147.

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letter of the 18th of November, in which the solicitors of the Company request the plaintiff to furnish them "with a statement of the expenses incurred on the authority of the committee," cannot create any liability when none previously existed. *Higgins v. Hopkins* (a) is distinguishable; for in that case there was no agreement that the acting committee should not be responsible; and it was a question for the jury, whether, under the circumstances, the plaintiff and defendant meant to contract on the footing of a personal liability of the defendant, either alone or as a member of the acting committee, or on the credit of the funds. Here there is an express stipulation that the provisional committee shall not be personally liable, and the contract, which is merely conditional, to pay out of the funds, was never rendered absolute by the receipt of funds. [*Parke, B.*—The term "funds" does not mean "deposits," but the funds of the Company when formed.]

The Court then called on

Sir *A. Cockburn*, *Bramwell*, and *Wilkinson* to support the rule.—The question is, what was the contract between the parties; and that is to be collected from the correspondence and the resolutions of the committee. The



of the 11th of October, in which he says "I never understood, that, unless the project was successful, the engineers were to abandon all claim; but I did understand that the individuals comprising the committee were not to be held personally liable." According to the true construction of these documents, the meaning of the parties was, that the provisional committee should not be liable at all events, but that as soon as sufficient funds were collected the plaintiff should be entitled to enforce his claim. The right to payment was not to be contingent on the final completion of the Company, but only on sufficient funds being obtained. Then, were there available funds? It is submitted that there were. The plaintiff was not bound to consider the liabilities of the provisional committee to the shareholders in respect of deposits, but immediately funds came to their hands they were liable to pay.

PARKE, B.—The rule must be discharged. It is clear that the plaintiff undertook to do the work, not upon a contract with the provisional committee, but looking to the chance of the scheme succeeding, and of there being funds available for the payment of his claim. The plaintiff's letter, of the 11th of October, shews that there was no contract on the part of the provisional committee that he should be paid at all events. In the majority of cases of this kind, the contract is that the party shall look only to the funds of the Company, and not to the responsibility of the individuals who manage it.

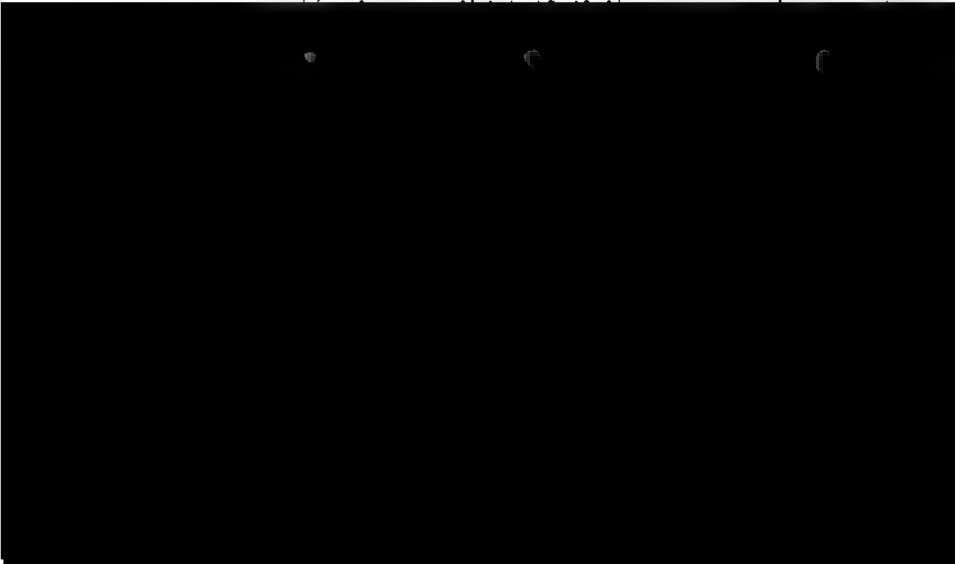
PLATT, B.—I am of the same opinion. This action cannot be maintained, unless there was a personal responsibility on the part of the defendant to pay the plaintiff. But, by the resolution of the 12th of August, the provisional committee distinctly repudiate any personal liability; and it appears from the resolution of the 17th of October, that the plaintiff agreed to make no claim for

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his services "until there should be sufficient funds of the Company to meet any demand he might be entitled to make." That must surely mean sufficient funds of that description which the committee could properly apply in satisfaction of the plaintiff's claim. Now, the sum of 4168*l.*, which consisted of deposits, was not a fund of that description; for, on the abandonment of the scheme, all the depositors were entitled to call for repayment of their deposits, the consideration upon which their duty to pay was founded being at an end. The sum in question; therefore, was not available in satisfaction of the plaintiff's demand, and there were no funds out of which he was entitled to be paid.

MARTIN, B.—I am of the same opinion. The case has been put to us much in the same way that a counsel puts a case to a jury. He tells them that the plaintiff has done the work, and that he is entitled to be paid for it; and laying aside the documents upon which the contract is founded, he calls upon the jury, and frequently with success, to infer a contract which renders the defendant liable. The answer is, that the true contract between the parties must be looked at for the purpose of ascertaining with whom the liability rests. Now, in this case, was there



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DWYER v. COLLINS.

May 8.

THIS was an action by the indorsee against the acceptor of a bill of exchange: to which the defendant pleaded, *inter alia*, that the bill was given for a gaming debt. On the trial, before the Lord Chief Baron, at the Middlesex Sitings after last Term, the defendant proceeded to prove his plea; and for that purpose gave evidence of the gaming, and swore that the only bill he ever gave to the drawer of the bill which was declared on, was by way of payment of the debt then incurred. The defendant's counsel, being required to prove that the identical bill declared upon was that which was given on that occasion, called for the bill, which the plaintiff's counsel declined to produce. The defendant's counsel then called as a witness the plaintiff's attorney, who was present in Court, and asked him whether he had the bill with him. The plaintiff's counsel objected that such a question need not be answered, as it would be a breach of professional confidence to do so. The Lord Chief Baron, after consulting some of the other Judges of this Court—at that time sitting in the Exchequer Chamber—decided that the question must be answered. The attorney having admitted that the bill was in his possession and in Court, the defendant's counsel called for its production; which being refused, he then offered to give secondary evidence of its contents. The plaintiff's counsel objected, that there ought to have been a previous notice

The relation of attorney and client prevents the former from disclosing any communication made to him in the ordinary course of his employment, and on the faith of the confidence which the client reposes in his legal adviser. But the privilege does not extend to matters of fact, which the attorney knows by any other means than by confidential communications with his client, though, if he had not been employed as attorney, he probably would not have known them.

Thus, in an action on a bill of exchange, to which the defendant pleaded that the bill was given for a gaming debt; and it was deposed, that the only bill which had been given

by the defendant was that upon which the action was brought; and, after a request then made to the plaintiff to produce the bill, the plaintiff's attorney was called on the part of the defendant, and asked whether he then had the bill with him in Court:—*Held*, that the attorney would not be guilty of any breach of professional confidence in answering the question, and that it was admissible.

The true principle on which a notice to produce a document on the trial of a cause is required, is, not to give the opposite party notice that such a document will be used by a party to the cause, in order to enable him to prepare evidence to explain or confirm the document, but is merely to give him a sufficient opportunity to produce it, and thereby to secure, if he pleases, the best evidence of the contents; and therefore, where a document is shewn to be in court, a request to produce it immediately is sufficient.

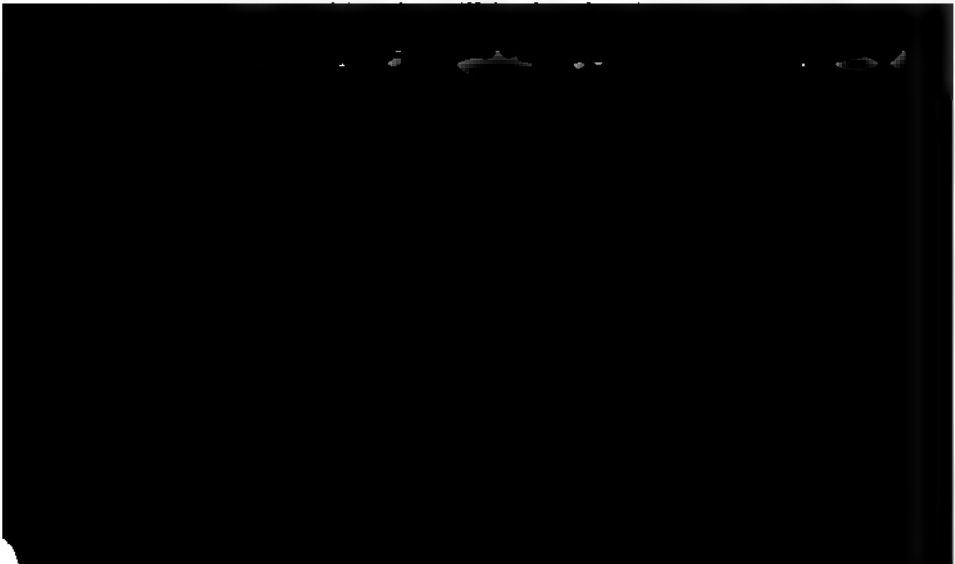
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to produce; and the Lord Chief Baron, after consulting the same Judges, ruled in favour of the defendant. The evidence was then given, and a verdict passed for the defendant, the Judge reserving leave to the plaintiff's counsel to move to enter a verdict on the points made at the trial.—On a former day in this Term,

Humfrey obtained a rule nisi accordingly. He cited *Goodered v. Armour* (a), *Cook v. Hearn* (b), *Doe d. Gilbert v. Ross* (c), and 1 Stark. on Evidence, 404, 3rd edit.

Hawkins (*James* with him) shewed cause (d).—First, the plaintiff's attorney was not exempt, by reason of any privilege, from answering the question whether he had the bill of exchange then with him. The question did not require the contents of that document to be given. If he had been asked whether his client was then present in Court, that question would have been admissible.

Secondly, the notice to produce the bill was given in sufficient time, as it was shewn that that document was at the time in Court; and moreover, no excuse whatever was given for its non-production, for the plaintiff relied solely upon the objection that the notice had not been given in due time, as required by the rules of practice. The authorities cited on the part of the plaintiff, in mov-



debt under the commission, the defendant agreed to accept, and did accept, the bill in part payment of the debt, whereby the bill was void. The plaintiff, in his replication, denied the acceptance in part payment of such debt. It was held that the defendant was not entitled to give secondary evidence of the bill without a notice to produce; and that the allegations in the plea did not impose the obligation upon the plaintiff to produce the bill on the trial of the cause. In that case, it appears that no notice to produce had been given, neither was it shewn that the bill was in court. Again, in *Laurence v. Clark* (a), where to a declaration upon a bill of exchange the defendant pleaded a plea of fraud and covin, it was held that the plaintiff was not bound to produce the bill on the trial without a notice given in due time; and *Alderson*, B., in his judgment, says—"All these cases depend on their particular circumstances, and the question in each is, whether the notice was given in reasonable time to enable the plaintiff to be prepared to produce the document at the time of the trial. Here the notice was given at half-past eight o'clock the evening before, by being left at the office of the attorney. If the service had been half an hour later, it would have been a bad notice altogether for that night; but, as it is, it seems to me not to be a sufficient notice reasonably to enable the plaintiff to produce the bill at ten o'clock the next morning, when the cause was to be tried. Several cases have been cited, each of which depends upon its own circumstances. In the present case, I do not say, if the paper were lying before the attorney at the time, that the notice would not be sufficient; but it is not shewn whether it was in his or his client's possession. As to the other point, I am clearly of opinion that the evidence was not admissible without a notice to

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(a) 14 M. & W. 250.

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produce. It certainly is in the nature of secondary evidence, for the purpose of shewing the identity of the bill." And Rolfe, B., adds, that he concurs in these observations. In *Cook v. Hearn* (a), which was an action by a landlord against his tenant, the defendant's counsel, in order to shew that the defendant had paid money into Court, called the defendant's attorney, and asked him if he had not in Court the rule for payment of money into Court. This was objected to, on the ground that no notice to produce had been given, or subpœnâ duces tecum had been served on the attorney. Patteson, J., refused to allow the question to be asked, and also held, that a notice to produce, given at the trial, would not be in time. The report proceeds to state, that Patteson, J., afterwards informed the Court in banco of the course he had adopted; and that Parke, J., and Taunton, J., assented to it. [Parke, B.—I remember, the first time I read the report of that case, it struck me that there must be some misapprehension on the subject; and, at the time I made a note of it, I added a quære to it. The question really turns upon the principle of the rule on which a notice to produce is required. In Starkie on Evidence, p. 404, the rule is laid down in the following terms:—"Proof that the adversary or his attorney has the deed or other instrument in court does not supersede the necessity of notice, for the object

all that is necessary is that the notice should be given in sufficient time to the opposite party, to enable him to be ready to produce the document at the trial. I have always been of opinion that this is the true object of the notice; and if this be so, the inquiry relating to the sufficiency of the notice is a simple one; but if the proposition laid down by Mr. Starkie in his work be correct, the inquiry would often be one of an extremely complicated character; for it might depend upon the nature of the document and many extrinsic circumstances.] In the present case, the instrument called for was at the time in Court, and no excuse was given for not producing it.

The Court then called upon

Udall (with whom was *Humfrey*) to support the rule. First, the plaintiff's attorney was exempted from answering the question, whether he had the document in his possession, upon the principle that it was intrusted to him in professional confidence. In *Bate v. Kinsey* (a), which was an action of debt for rent by the assignee of the reversion against the assignee of the term, the plaintiff's attorney, who had been called to prove the execution of the deed, admitted, on cross-examination, that there had been another deed between the same parties relating to the demised premises executed after the former, and that he had that deed in court; but he refused to produce it, relying on his privilege. The defendant, without having given a previous notice to produce that deed, then offered to give secondary evidence of its contents; and the full Court held that such evidence was improperly rejected. [*Parke*, B.—That decision proceeded upon the ground that the defendant was not entitled to use as secondary evidence that which he had obtained or would obtain out of the mouth of the plaintiff's own attorney; for it did not

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(a) 1 C. M. & R. 38.

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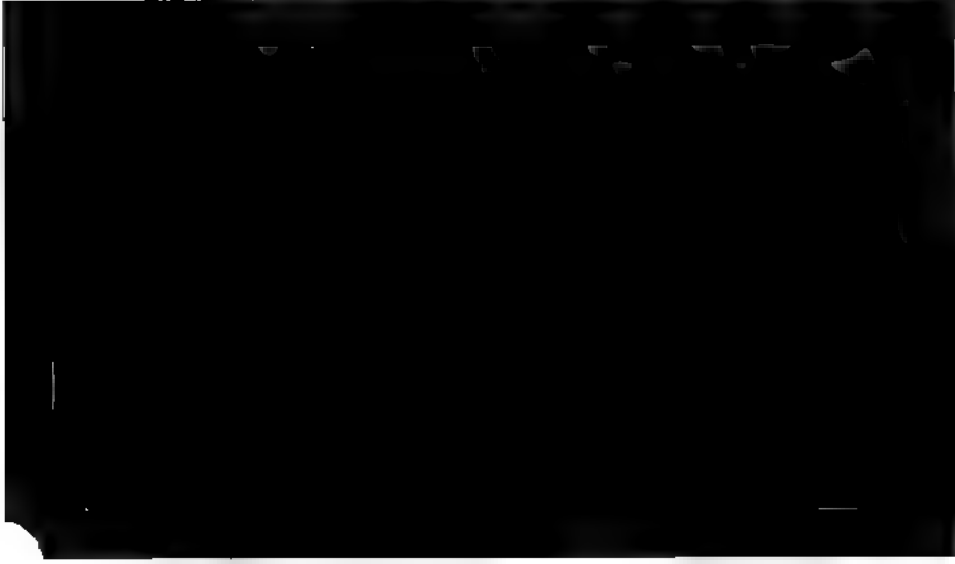
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appear that the defendant was prepared with any other secondary evidence, and an attorney cannot be compelled to state the contents of his client's deed. But here the attorney is not required to state the contents of the bill, but the simple fact merely whether or not he has the instrument with him. In *Coates v. Birch* (a) it was held, that, for the purpose of letting in secondary evidence, the attorney of the hostile party may be asked whether he has possession of a document, though it appears that he obtained it from his client only in the course of communication with reference to the cause. That appears to be strictly in point.]

Secondly. The notice was insufficient. The authorities and text writers are expressly in favour of the plaintiff upon this point. *Cook v. Hearn*, if correctly reported, is a decisive authority. In addition to the passage cited from Starkie on Evidence, Phillipps on Evidence, Vol. 1, p. 425, 6th edit., contains the following passage:—"It seems now to be the better opinion, that neither party will be allowed, either in an examination in chief or in a cross-examination, to inquire into the contents of a deed, merely because the opposite party has the original deed in his possession in Court at the time of the trial; and the opposite party may object to such parol evidence of the contents, on account of his not having received a previous



The judgment of the Court was now delivered by

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PARKE, B. [after stating the facts as set forth at the commencement of the report, his Lordship proceeded]—Mr. *Humfrey* obtained a rule nisi for a new trial, and the Court granted it, as we thought the subject fit to be more fully considered, notwithstanding the opinion which had been given to the Lord Chief Baron, and on which he had acted. The case has been fully argued at the bar, and all the authorities considered; and we are of opinion that the rule ought to be discharged. We do not propose to decide whether the defendant's evidence in this case, that no other bill was given to the drawer than one for this gambling debt, superseded the necessity of further proof; nor to consider the question, whether the pleadings themselves give as much notice that the bill will be the subject of inquiry as they do in an action of trover for a written instrument, where a notice to produce is unnecessary—it having been decided by the Court of Queen's Bench in *Read v. Gamble* (a), and in *Goodered v. Armour* (b), and followed by this Court in *Lawrence v. Clark* (c), that in a case like the present the pleadings do not give constructive notice. We wish to decide this case upon the more general ground, the principal subject of the argument at the bar. There are, therefore, two questions to be considered.

First, whether the plaintiff's attorney was protected from answering the simple question, as to the bill being in his possession and in court.

Secondly, whether, on his refusal, it was competent for the defendant to give secondary evidence of its contents, no previous notice to produce having been given.

We are of opinion that the ruling of my Lord Chief Baron was right, on both questions. The relation of attorney and client prevents the former from disclosing any

(a) 10 A. & E. 597, n. (b) 3 Q. B. 956. (c) 14 M. & W. 250.

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communication made to him in the ordinary course of his employment, and on the faith of the confidence which the client reposes in his legal adviser. But the privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them. Thus, he may prove the client's swearing to the truth of an answer in Chancery; and his handwriting, by seeing it in documents prepared by him in the name of his employer; in the same way he may prove the fact that a particular document is then in his possession and in Court—for this is not a fact professionally communicated to him; though of course he could not be compelled to disclose the contents of any document which is professionally intrusted to him, and which he is acquainted with only by virtue of professional confidence.

That the privilege of an attorney does not extend to protect him from answering whether the document is then in court, was decided by *Best*, C. J., at *Nisi Prius*, in *Bevan v. Waters* (a). In *Eicke v. Nokes* (b), Lord *Tenterden* permitted a clerk of the defendant's attorney to be asked, whether a copy of a bill had not been given to him by the defendant; and the Court of Queen's Bench decided, in the case of *Coates v. Birch* (c), that an attorney might be asked whether he had then in his possession, on the trial

permit the question to be put with respect to a rule of Court, because "no notice to produce had been given:" and he also decided, that a notice to produce *then* was too late; and the report goes on to state that the course adopted was approved of by *Taunton*, J., and myself, in the following Term. It is very doubtful from the report, whether the question was disallowed by *Patteson*, J.; and, so far as I am concerned, I think there must be a mistake, either of my own or the reporters, as it is at variance with the opinion I have always had on that point; and on referring to my MS. note of the motion for a new trial in Michaelmas Term, 1832, I find no trace of such a circumstance. The rule was moved for on the ground that it appeared, on the cross-examination of the plaintiff's witness, that there was a written agreement or lease, which was not produced, and the rule nisi was granted, suggesting a *stet processus*. This case is by no means a sufficient authority, and no other was cited which is in point, nor are we aware of any. This objection cannot therefore prevail.


The next question is, whether, the bill being admitted to be in court, parol evidence was admissible on its non-production by the attorney on demand, or whether a previous notice to produce was necessary. On principle, the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then, no doubt, a notice at the trial, though the document be in court, is too late. But if it be merely to enable the party to have the document in court, to produce it if he likes, and if he does not, to enable the opponent to give parol evidence;—if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original, which he must do before he can be permitted to make use of secondary evidence, then the demand of

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production at the trial is sufficient. We are not able to find a trace of the reason suggested on the part of the plaintiff, until it is mentioned by Mr. Starkie, in his book on Evidence, and afterwards by Mr. Taylor, in his. There is no satisfactory authority which appears to us to support such a position. If this be the principle on which notice to produce is required, it is a solitary instance, we believe, in the law, prior to the New Rules, of its being necessary for one party to give notice of the evidence which the other means to adduce against him. If this be the true reason, the measure of the reasonable length of notice would not be the time necessary to procure the document, a comparatively simple inquiry, but the time necessary to procure evidence to explain or support it, a very complicated one, depending on the nature of the plaintiff's case, and the document itself and its bearing on the cause; and in practice such matters have never been inquired into, but only the time, with reference to the custody of the document, and the residence and convenience of the party to whom notice has been given, and the like. We think the plaintiff's alleged principle is not the true one on which notice to produce is required, but that it is merely to give a sufficient opportunity to the opposite party to produce it, and thereby to secure, if he pleases, the best evidence of the contents; and a request to pro-



where, in which Lord *Kenyon* is said to have told the attorney that he need not produce the instrument, which had a subscribing witness, unless he had notice in time to enable him to produce the attesting witness. There is probably a mistake in this, as the party requiring the document would have been bound, if it were produced, to call the subscribing witness, unless in the excepted case where the party producing it claimed title under it. This case cannot be relied upon. In the case of *Doe v. Grey* itself, it did not appear that the attorney had received the notice to produce, which the night before was served upon his wife, or had the lease itself *in court* on the trial. Nor does that fact appear in either of the cases of *Read v. Gamble* and *Laurence v. Clark*, before referred to;—the expression, that the counsel *refused* to produce, is not equivalent, and the fact is not so proved. We think that the rule must be discharged; and it would be some scandal to the administration of the law if the plaintiff's objection had prevailed.

Rule discharged.

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THE JUSTICES OF BEDFORDSHIRE and C. FORSTER, J. PARSONS, and J. FERRIS, Appellants, v. THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF ST. PAUL, BEDFORD, Respondents.

April 28.

Three houses, situated beyond the actual wall of a county gaol, but within its precincts, were appropriated to the occupation of the governor and of two of the warders of the gaol, respectively, and they inhabited these houses solely as officers of the gaol. The house of the governor had an internal communication with the gaol, but the other houses had no communication with it, except by means of the principal entrance of the

THIS was a special case, stated for the opinion of this Court, under the 12 & 13 Vict. c. 45, with the consent of the parties, under an order of *Martin, B.*

It was an appeal against a rate and assessment for the relief of the poor of the parish of St. Paul, in the borough of Bedford, in the county of Bedford, and for other purposes, made the 5th of May, 1851, after the rate of 6d. in the pound.

Against this assessment the appellants duly gave notice of appeal, on the following grounds, viz:—

That each of the houses in the rate mentioned, for which the said C. Forster, J. Parsons, and J. Ferris are respectively rated as occupiers, is parcel of the gaol of the county of Bedford. That each of the said parties inhabits the house, as occupier of which he is rated in the rate, solely as an officer of the said gaol, and in compliance with certain regulations relating thereto, theretofore adopted and

vernor, and Parsons and Ferris were the warders, of the gaol and house of correction of the said county. The parish of St. Paul is situated within the borough of Bedford, which has a recorder, and to which a separate commission and a separate court of quarter sessions of the peace have been granted; and the jurisdiction of the justices of the borough is independent and exclusive of that of the justices of the said county; and the appointment of the overseers in the appeal, by whom the said rate was made, was by the justices of the borough only, and not by the justices of the county.

Previously to the year 1848, the governor had his dwelling-house, and the officers of the gaol had their apartments, within the gaol. In the year 1848 the gaol was rebuilt, in conformity with plans submitted to and approved by her Majesty's Principal Secretary of State for the Home Department; and under his express direction, the houses now occupied by the governor and the warders were then purposely so constructed as not to adjoin any portion of the gaol or house of correction in which prisoners are confined. Those portions of the gaol and house of correction in which prisoners are confined stand on an area surrounded, except as shewn on the plan to the case annexed; by a high wall, which is at some distance in every part from the buildings within. The house occupied by the governor, and in respect of which he was rated, was at the left-hand side of the prison gateway, and the front door, which is the ordinary entrance, opens on the public street, and the house is on the outside of the wall. The wall and the back wall of the house are in the same line, and the house projects forwards from such line, with its side walls at right angles to it. The house communicates, by an outlet through the back wall, with the area. The house, in pursuance of the directions of the Secretary of State, was originally built without any outlet through the back wall, or otherwise from within it, into

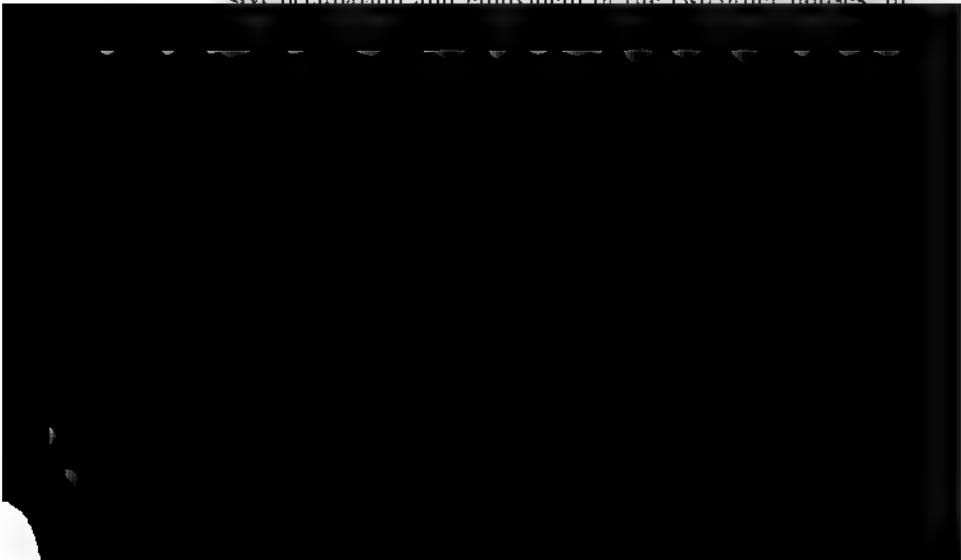
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the area; and the outlet had some time subsequently been made by direction of the justices appellants, at the special request of Forster, to facilitate his access to the area and the buildings within the same; and until that time there was not any means of access to the area and buildings within it, except through the public entrance.

The two houses in respect of which Parsons and Ferris were rated, stand on the right-hand side of the prison gateway. They had one common outer door in front, which opened on the public street, in like manner as in the house occupied by Forster. Though at the time of making the rate they were internally two distinct houses, in external appearance they are one house, precisely corresponding with the house on the left-hand side of the prison gateway, in respect of which Forster is rated. They are situate, in reference to the wall, in precisely the same way as the house of Forster, except that they still continue to be, as originally built, without any outlet through the back wall, or otherwise, from within the houses or either of them into the area.

At the time of the making of the rate, Forster was in the exclusive occupation and enjoyment of the said house in respect of which he is rated, with his wife, family, and servants. And Parsons and Ferris were also in the exclusive occupation and enjoyment of the two other houses, in



The spaces enclosed by the same low wall formed, at the time of the making of the rate, yards, which are easements to the houses of Forster and of Parsons and Ferris respectively; those on the left-hand side of the prison gateway are exclusively occupied and enjoyed by Forster, with the house there. Of those on the right-hand side of the prison gateway, one is exclusively occupied and enjoyed by Parsons, with one of the houses there; the other by Ferris, with the other of the houses there.

The Regulations which are acted on in the said prison were recommended by the said Secretary of State, and adopted by the said justices, appellants, and among these are the following, viz.—

Rule 21. *The Governor*.—He shall not be under-sheriff or bailiff, nor concerned in any occupation or trade; he is not to sell or let (nor is any person in trust for him to sell or let), or have any benefit from the sale or letting of any article to or dealing with any prisoner; he shall not let for hire to any person any room or portion of the residence allotted to him in the gaol, nor any room or ground belonging to the gaol; he shall not directly or indirectly have any interest in any contract or agreement for the supply of the prison. He shall see that the provisions of this rule are enforced on all other officers of the prison; and that no officer at any time receive any money, fee, or gratuity of any kind, on or for the admission of any visitor to the prison or to the prisoners.

Rule 24. He shall reside in the prison, and he shall not be absent from it for a night without permission in writing from a visiting justice; and his leave of absence, with the name of the visiting justice granting it, shall be entered in his journal; but if absent, without leave, a night from unavoidable necessity, he shall state the fact and cause of it in his journal.

Rule 32. He shall visit and inspect every ward, cell, yard, and division of the prison, and see every prisoner once at

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least in every twenty-four hours; and in default of such daily visits and inspections, he shall state in his journal how far he has omitted them, and the cause thereof. He shall at least once a week go through the prison at an uncertain hour of the night, which visit, with the hour and state of the prison at the time, he shall record in his journal. When visiting the female prison, he shall be attended by the matron or some other female officer.

Rule 35. He shall direct that the prison be locked for the night and the keys of the outer-gate be delivered to him at ten o'clock each night; and that a report be then made to him whether the officers resident in the prison are all present. He shall keep the keys until the hour of unlocking in the morning, and shall not allow ingress or egress between the hour of locking at night and unlocking in the morning, except to the chaplain and medical officer; and in special cases, the latter to be entered in the governor's journal.

Rule 107. *Subordinate officers, male and female.*—They shall strictly conform to the rules of the prison, obey the directions of the governor, and assist him in maintaining order and discipline. And Rule 111. They shall not be absent from the prison without leave from the governor; on going out with permission or on duty, they shall leave their keys, instruction-book, and report-book in the go-



Forster, Parsons, and Ferris, or either of them, was liable to be rated to the poor of the said parish in respect of their occupancy of the said houses. If they were not, the assessment was to be amended by striking out that portion of it set out in the case; if otherwise, that portion, or such part of it as the Court should adjudge, was to remain. In either case such costs were to be paid as the Court should adjudge; and judgment was to be entered by the Court of Quarter Sessions accordingly.

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Tozer, for the appellants, claimed the right to begin.

Worlledge (with whom was *H. Mills*) for the respondents.—The question for the opinion of the Court is submitted under the 12 & 13 Vict. c. 45, by which parties to appeals may state a case for the decision of one of the superior Courts. There is therefore no decision of the Court below, and the respondents are bound to shew that the appellants are liable.

PER CURIAM.—The respondents are entitled to begin, as the affirmative lies upon them.

Worlledge.—The houses in question are liable to be rated to the relief of the poor. The 43 Eliz. c. 2, imposes such a liability upon all property in a parish, and the appellants are liable to the rate unless they can establish an exemption from that common liability. The appellants will rely upon the case of *Reg. v. Shepherd (a)*, on the ground that the houses which they occupy are parcel of the county gaol. But, in the case referred to, the gaoler's house was situate *within* the walls of the gaol itself, and for that reason was held to be exempt from the rate. But these houses are not within the prison walls. It is clear that, if

(a) 1 Q. B. 170.

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the appellants had resided in another part of the town, at some distance from the gaol, their residences would have been rateable. It may be further argued, that the appellants have an occupation beyond what their duties require. The case finds that the governor and warders were in the exclusive occupation of these premises. In *Reg. v. Shepherd* the occupation by the party was only as governor, and the accommodation was not more than was proper and convenient for such occupation. In *Reg. v. Terrott(a)*, the commanding officer in barracks had distinct apartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and his family, containing a kitchen and other offices, and a stable yard and garden; and it was held that he was rateable, having a beneficial enjoyment of the premises beyond his necessary accommodation as an officer for the purpose of public service. So, in the cases of *Hampton Court Palace, Reg. v. Ponsonby(b)*, it was held that the occupiers of apartments in that palace were rateable to the poor in respect of the apartments held by them by permission of the Crown. [Alderson, B.—I think that the decision in *Reg. v. Shepherd* is excellent sense, and that it settles the present question. If a house be such as to be necessarily occupied by a public officer in the performance of his duties, he is not rateable to the

enter these houses to satisfy themselves as to the nature of the occupation. The houses are open to them, as forming part and parcel of the gaol.]

Mills applied to be also heard for the respondents; but the Court said, that they would not hear more than one counsel on either side.

Tozer, (with whom was *Pearse*), contra, was not called upon, but he applied for costs.

PER CURIAM (a).—The rate cannot be supported. *Reg. v. Shepherd* governs the present case. The question is between the county justices and the parish authorities, and the latter are wrong, and must pay the penalty in the shape of costs.

Rate to be amended accordingly, with costs(b).

(a) *Pollock*, C. B., *Alderson*, B., and *Martin*, B.

(b) *Parke*, B., entered the Court at the conclusion of the case, and

stated that he agreed with the decision of the Court, and thought that the question did not admit of a doubt.

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April 28.

THE JUSTICES OF BEDFORDSHIRE, Appellants, v. THE COMMISSIONERS FOR THE IMPROVEMENT OF BEDFORD, Respondents.

The 4 Geo. 4, c. 64, s. 48, does not exempt a county gaol, situate in a borough, from borough rates. That section merely affects the jurisdiction of the county justices.

By 43 Geo. 3, c. cxxviii., s. 59, (An Act for the improvement of the town of Bedford), passed, inter alia, for the purpose of keeping the streets of the town in repair and lighted, a certain sum was to be assessed upon all halls, gaols, churchyards, &c., within the town of Bedford, "for every yard running measure of the

THIS was a special case, stated for the opinion of this Court by the consent of the parties, under an order of *Martin, B.*

It was an appeal against a rate made on the 13th of August, 1851, under the provisions of the 43 Geo. 3, c. cxxviii., and 50 Geo. 3, c. lxxxii., which imposed a rate of 1s. 6d. upon all halls, gaols, &c., within the town of Bedford, for every yard running measure of the length in front of such halls, gaols, &c.

By this assessment the appellants were assessed in respect of the gaol and house of correction of the county of Bedford, in the following form:—

AS TO PUBLIC BUILDINGS.

No. of Assessment.	Names of Occupiers.	Names of Owners.	Description of Premises and Property rated.	Running Measure of the Length in Front.	Sums assessed at 1s. 6d. per Yard.
	<i>In the Parish of St. Paul.</i>			<i>Yards.</i>	<i>£ s. d.</i>
1821	Justices of the county of Bed	Inhabitants of the coun-	County Gaol	247	18 10 6

that in the latter case the rate would amount to 5*l.* 16*s.* instead of 18*l.* 10*s.* 6*d.*, the sum at which the gaol was rated.

The parish of St. Paul is situate within the borough of Bedford, which has a recorder, and to which a separate commission and a separate Court of Quarter Sessions of the peace have been granted; and the jurisdiction of the justices of the borough is independent and exclusive of that of the justices of the said county; and the appointment of overseers of the poor of the parish is from time to time made by the justices of the borough only, and not by the justices of the county.

By the 43 Geo. 3, c. cxxviii. (local and personal), intituled "An Act for the Improvement of the Town of Bedford, in the County of Bedford, and for Rebuilding the Bridge over the River Ouze in the said Town," sect. 1, the respondents are constituted Commissioners for putting the Act into execution, by the style of "The Commissioners for the improvement of the town of Bedford, in the county of Bedford," and by such name and description shall and may sue and plead and be sued in all courts and places whatsoever; and by sect. 2, provision is made for supplying vacancies. By sect. 50, for raising money to enable the Commissioners to carry the several purposes of the Act into execution, they are empowered to make rates upon houses and other private properties, but not to exceed in the whole in any one year 8*d.* in the pound, according to the yearly rent or value of such houses, &c. By sect. 51, the annual value of all such houses, &c. is to be ascertained from the poor's rates of the respective parishes; and the year of rating is to commence from the 24th of June. By sect. 59 it is enacted, "that the sum of 1*s.* and no more shall yearly be rated and assessed upon all halls, gaols, chapels, meeting-houses, schools, almshouses (except the almshouses founded by Christie Skinner, deceased) and other public buildings, church-yards, chapel-yards, and meeting-house-yards within the said town, *for every yard*

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running measure of the length in front of such halls, gaols, chapels, meeting-houses, schools, almshouses, and other public buildings, church-yards, chapel-yards, and meeting-house-yards; and the rates or assessments so to be made and laid upon the county hall, county gaol, or any other public county building, shall be paid by the treasurer of the county of Bedford for the time being." By sect. 117 a power of appeal is given to persons aggrieved by any rate or assessment. By 50 Geo. 3, c. lxxii. (local and personal) intituled "An Act for amending and enlarging the Powers of an Act of his present Majesty, intituled 'An Act for the Improvement of the Town of Bedford, in the County of Bedford, and for Rebuilding the Bridge over the River Ouze, in the said Town;'" sect. 2, the power of rating gaols and public buildings is extended to 1s. 6d. per yard running measure in front; but the first Act of 43 Geo. 3, was not in any other respect altered as regarded the matter of this case.

Until Michaelmas, 1819, the county prison comprised, as now, the common gaol and house of correction in one building, having but one frontage adjoining a public street, and was assessed to the improvement rate according to the linear measure per yard of its front adjoining that street, being the present frontage to St. Lloyd's street; and such rate was not disputed. In 1819 the justices pur-

sent county prison and the subject of the appeal, by enlarging and erecting various additional buildings to the old gaol, the gateway, porter's lodge, and governor's and warders' houses, forming the front to St. Lloyd's street, and the only entrance to the new prison being from St. Lloyd's street by the above gateway. The separate house of correction, having become useless, was lately pulled down, and the site converted into a garden and airing ground for the purposes of the new prison, with a blank wall about twenty feet high and sixty-one yards in length, bounding the frontage of, but without any entrance from, Offa-street.

The north-west boundary wall of the new prison, for about sixty-seven yards, adjoins a public road leading from St. Lloyd's street to Adelaide-square; the south-east boundary wall, for about thirty-three yards, adjoins some ground of the Duke of Bedford, which was kept inclosed, and used as a private way to land of his Grace, which was sold in building lots, in April 1842, when the gate and inclosing fence were removed, and the ground, before used only as a private way, was left open for the use of the purchasers, and the public now use it as a road from St. Lloyd's street to Harper-street and Offa-street, and the Commissioners repair it.

The rate in dispute was made upon the principle that the county is liable to be rated in respect of all parts of the prison estate adjoining any public road, which the respondents considered a rateable frontage, and not restricted to the front of the building; and therefore the linear or running measure stated in the rate included not only the length in front next St. Lloyd's-street, but the length of the blank wall at the back of the prison, adjoining to and occupying the frontage of Offa-street, lately the front of the house of correction, and also so much of the side boundaries as adjoined the two roads before mentioned on the north-west and south-east sides.

The question for the decision of the Court was, whether

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the appellants were liable to be rated in the rate in respect of the county gaol. If they were not, the assessment was to be amended by striking out that portion of it which is set out in this case. If the Court should decide that the appellants were rateable, the amount of rate was to be ascertained on such principle as the Court should determine, and such portion of the rate was to be amended upon the principle so determined by the Court. In either case, such costs to be paid as this Court should adjudge, and judgment was to be entered by the Court of Quarter Sessions for the borough accordingly.

Worlledge (with whom was *H. Mills*) for the respondents.—There are two questions raised for the opinion of the Court by this appeal. The first question is, whether the county gaol of the county of Bedford is liable at all to the rate imposed upon it by the Commissioners for the improvement of the town of Bedford. And, assuming such liability to exist, the second question has reference to the amount of the rate.

As to the first question—The appellants will rely upon the 4 Geo. 4, c. 64, s. 48 (*a*), and the proviso to the 8th

(*a*) That section enacts, "That every gaol, house of correction, or other prison, court, yard, building, appurtenance, or addition, is or shall be situated within

section of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76. Now the 48th section of the former of these two Acts merely gives to the justices of the county jurisdiction to commit prisoners to a borough gaol or house of correction, in the same way as they would have been empowered so to do if such gaol or house of correction had not been situate in the borough; and the proviso to the 8th section of the Municipal Corporation Act does not affect this question. The 8th section contains a proviso "that every county gaol, house of correction, or lunatic asylum, court of justice, or judges' lodging, which, at the time of the passing of this Act is taken to be for any purpose within any county, shall still, for all such purposes, be taken to be within such county, anything herein contained to the contrary notwithstanding." These enactments do not remove the liability of the borough gaols to the payment of the rate in question, by taking such buildings out of the borough. They are therefore still liable to contribute to the expenses of improving the town. The 59th section of the Local Act, 43 Geo. 3, c. cxxviii., expressly names gaols amongst the public buildings to be rated.

The second question, as to the amount of the rate, turns upon the meaning of the language of the 59th section, which provides that the sum of one shilling and no more (which was raised to 1s. 6d. by the 50 Geo. 3, c. lxxxii.,

same shall be used, and no longer; and the justices of the peace, mayors, jurats, coroners, constables, and other officers of such county, riding, or division, county of a city, county of a town, or of such town, liberty, soke, or place, for which the same shall be used as a gaol, house of correction, or other prison, shall, during the time that the same shall be so

used, have as full power and authority therein as they would have if the same was not situate within the limits of such other county, riding, or division, county of a city, county of a town, or of such town, liberty, soke, or place, any charter, law, or usage to the contrary thereof in anywise notwithstanding."

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s. 2,) shall yearly be rated upon all halls, gaols, &c., and other public buildings, church-yards, &c., "for every yard running measure of the length *in front* of such halls, gaols, &c." The respondents contend that the measurement of a public building sought to be rated is not to be confined strictly and absolutely to the front itself of the building; but that the whole of that part of the building which has its front or abuts on any public street under the control of the Commissioners, must be included in the measurement for the purpose of calculating the rate. The word "front" cannot receive its strict meaning here. The 32nd section of the local Act enacts, that "all persons occupying houses, buildings, &c., in or against any of the streets, squares, &c., shall cause to be swept and cleansed the footways, &c., the whole length of *the front* of their respective houses, &c." In this section a different expression is adopted to that used in the 59th section. The word "front" could not bear the construction contended for by the appellants if the place sought to be rated were a church-yard or chapel-yard, as such a place cannot properly be said to have a front.—He was then stopped by the Court.

Tozer (*Pearse* with him) contra.—First, by the 4 Geo.

4 c. 61 s. 48, and the 5 & 6 Will. 4 c. 76, the country road

that every part of a building which abuts upon some public street should be included in the measurement; for the Act is not so much for the repair of the streets as it is for the general improvement of the town. The rate is to be imposed upon the annual value of the property situated in the town; and as that value, in the case of public buildings, is not easily ascertainable, the Act requires that they should be assessed in proportion to the length of their fronts in which the principal entrance to the buildings may happen to be. The back of a building cannot be taken into account. [*Alderson*, B.—In some cases it would be difficult to define the front of a building. How would you rate a round building?] In that case the diameter of the building might perhaps be the measure of the extent of the frontage.

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Worlledge replied.

POLLOCK, C. B.—I do not entertain any doubt on the question submitted to us. I am of opinion that the 4 Geo. 4, c. 64, affects the question of jurisdiction only, and that the county gaol is left for all purposes of rating within the borough and parish within which it is locally situated. That being so, the only question is in what manner this building is to be rated; and after looking at the language of the local Act, and after hearing the able arguments which have been urged on behalf of the appellants, I am still of opinion that the term “in front,” in the 59th section, includes every part of the building which the justices could form into a front by opening doors or windows in it, so as to obtain communication with any street—in other words, that every part of the building is to be considered as frontage which fronts or abuts upon any public street. The justices must, therefore, pay according to the number of yards in measurement which all such parts make up. The principle upon which the pre-

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sent rate was made is, therefore, correct; and the rate ought to stand.

PARKE, B.—I am of the same opinion. The statute of Geo. 4 affects the question of jurisdiction only, and leaves the liability of the gaol to the rate in the same situation as it previously stood under the local Act. The Court is now called upon the first time to put a construction on the 59th section of that Act. The words "in front" are certainly ambiguous. But it is clearly the object of the Act, *inter alia*, that the streets of the town should be kept in repair and lighted, and that property there situated should contribute to such expenses in proportion to the benefits it derives from them. Now the appellants, as owners of the county gaol, enjoy the benefit of having the streets which surround the sides and back part of that building in a state of repair and lighted, quite as much so as they do with respect to the street in which is the front part of the building where the entrance is situated. They also possess the opportunity of making use of the back and side streets for frontage, by causing doors or windows to be opened, by which access may be obtained to those streets. They ought to pay for these advantages and benefits. In my opinion the expression "in front" has the same meaning as the term "frontage" has in popular par-

MARTIN, B.—I am of the same opinion. I think that this county prison remains legally as well as locally situate in the town of Bedford; and that the building ought to contribute to all the expenses which are incurred for those advantages which it derives from its situation, such as the repair of the streets, lighting, and such other matters.

Rate affirmed, with costs.

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DANSON v. LE CAPELAIN and STEELE.

May 5.

HALL moved for a rule, calling on the governor of Cold Bath Fields Prison to shew cause why an attachment should not issue against him, for not permitting process of this Court to be served upon one of the defendants, who was in the prison undergoing a criminal sentence. It appeared, by the affidavit of the plaintiff's attorney in the cause, that he had applied to the governor of the prison for permission to serve the defendant Le Capelain; but that he was refused, on the ground that the visiting magistrates of the prison had passed a resolution not to permit any prisoner to be served with any legal process whilst undergoing sentence of imprisonment.—It is submitted, that the claimant of a debt, who seeks to serve a prisoner in custody with civil process, in the absence of all fraud on his part and collusion with the prisoner, is improperly and illegally precluded from so doing. It may be that the resolution of the justices was framed with a view of defeating practices resorted to in abuse of the process of the superior Courts, whereby the friends of prisoners might improperly obtain access to them. [*Pollock*, C. B.—The regulation might have the effect of depriving suitors of their remedy.] A plaintiff, in a suit where the debt is joint, and where one of the defendants is in prison for some criminal offence, might find great difficulties in pro-

The governor of a prison, in compliance with an order of the visiting justices, refused to allow the process of this Court to be served upon a prisoner undergoing a criminal sentence. The Court granted a rule nisi for an attachment against the governor, on the condition that the rule was not to be served or acted upon, unless he persisted in refusing to allow service.

1862.

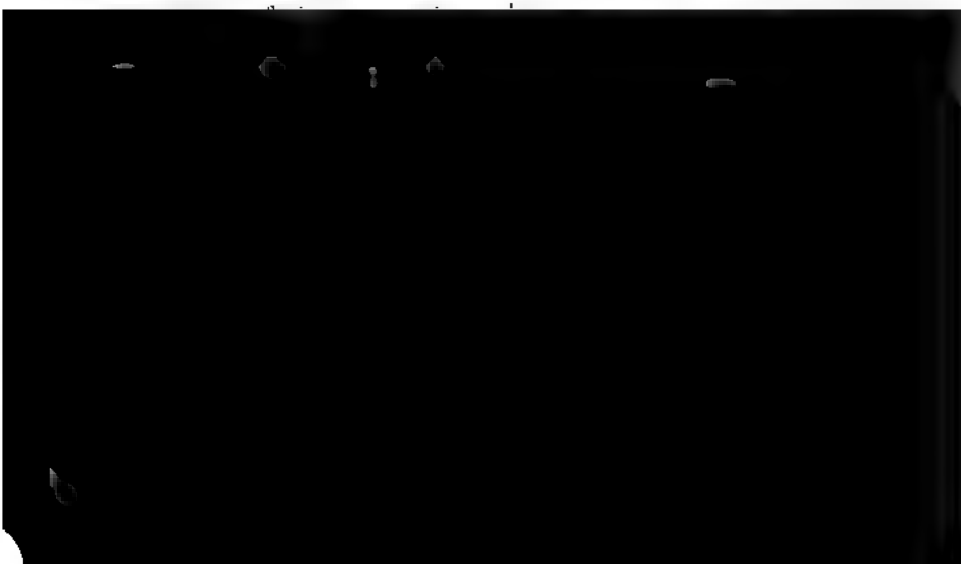
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ceeding with his demand. This application is not without precedent. In *Williams v. Smith and Another* (a), where one of two defendants was in custody on a criminal charge, the Court allowed him to be brought up to be charged with a declaration. And in *Coppin v. Gunner* (b), where the defendant was in custody under sentence of transportation, the Court of King's Bench permitted the plaintiff to serve the defendant with a latitat, to entitle the plaintiff to file common bail for him if he did not cause an appearance to be entered. The report concludes in the following terms:—"It being no prejudice to the gaoler, and there being no reason that the defendant should not pay his debts if the plaintiff could recover and find effects, he undertaking not to sue execution against the person of Gunner, and that consent being made part of the rule." It is apprehended that the gaoler would comply with the plaintiff's request if the Court should express an opinion in favour of this application. [*Parks*, B.—The difficulty here is, that the governor is not an officer of this Court.]

POLLOCK, C. B.—I think that the regulation is an interference with the rights of the subject. The plaintiff may take a rule nisi for an attachment; but it must not be served or acted upon unless the governor should persist in



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May 5.

LYTH v. AULT and WOOD.

THIS was an action of debt brought by the plaintiff, Margaret Lyth, against the defendants, in the Manchester Borough Court of Record, established under the 8 & 9 Vict. c. cxlv. The first count of the declaration was for 50*l.* for goods sold and delivered; and the second count was on an account stated.

The acceptance by a creditor of the sole and separate liability of one of two or more *joint* debtors, is a good consideration for an agreement to discharge all the other debtors from liability.

The defendant Ault pleaded three pleas. The second plea stated, in substance, that the account stated in the second count was stated of the debt in the first count, (identifying them); and that, at the time the debt was incurred by the defendants to the plaintiff, the defendants carried on business as partners together, and the goods were purchased from the plaintiff by the defendants as such partners, to wit, for the purposes of their said business, and not otherwise; and the debt was incurred by the defendants as such partners as aforesaid, and not otherwise; and that afterwards, to wit, &c., the defendant Ault was about to retire from the partnership, and the partnership business was thereafter intended to be carried on by the defendant Wood alone; of all which the plaintiff then had notice; and thereupon, by an agreement then made between the plaintiff and the defendants, it was agreed that the plaintiff should then and there be paid the sum of 12*l.* in part payment of her debt, and in satisfaction and discharge of the sum of 12*l.*, part thereof; and that the plaintiff should relinquish and abandon her claim against the defendant Ault for the residue of the said debt; and that the defendant Wood should become solely and separately liable to pay the plaintiff the said residue of her said debt; and that the plaintiff should and would accept and take the defendant Wood alone as her debtor for the said residue of the said debt, instead of the defendants jointly, and should have no further claim against the de-

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defendant Ault in respect of the said residue of the said debt; and that accordingly thereupon, in pursuance of the said agreement, and in consideration of the premises, the plaintiff was paid by the defendants, and did accept from them, the said sum of 12*l.* in part payment of the said debt, and in full satisfaction and discharge of the said sum of 12*l.*, part thereof; and the defendant Wood promised the plaintiff to pay her on request the said residue of the said debt, and to become solely and separately liable therefore; and the plaintiff then accepted the defendant Wood alone as her debtor for the said residue of the said debt, and did wholly relinquish and abandon her said claim against the defendant Ault for the said residue.—Verification.

The plaintiff replied to the second plea by traversing the agreement therein stated.

At the trial, in the borough court, the issues raised by the first and third pleas were found for the plaintiff, but the defendant had a verdict upon the second plea.

Cowling now moved for a rule calling on the defendant to shew cause why judgment should not be entered for the plaintiff upon the second issue non obstante veredicto (*a*). —The agreement of the plaintiff to accept the sole liability of one of two debtors in lieu of the liability of both



that arrangement, for the Court cannot inquire into the value of the consideration. If there be any consideration whatever, it will support an agreement. Now, although 10*l.* would be no satisfaction for a debt of 100*l.*, yet an article of much less value than 10*l.* may be given and received in satisfaction of such a debt. It may at first appear paradoxical, but the sole responsibility of one of many partners may be of greater value than that of all, for you may thereby obtain the security of his real and personal estate. *Pollock*, C.B.—The exchange may be of great advantage to the creditor, for it may be much more desirable to have the sole security of a rich old man than the joint security of the old man and of a young man without any property. *Parke*, B.—The cases of *David v. Ellice* (a) and *Lodge v. Dicas* (b), seem to favour your position; but the deductions which have been drawn from them have been considered unsatisfactory, and the more recent case of *Thompson v. Percival* (c) lays down the true principle upon this subject.] Those decisions were discussed by Lord Chancellor Cottenham in *Winter v. Innes* (d). *Lodge v. Dicas* is expressly in the plaintiff's favour. *Thompson v. Percival* is clearly distinguishable; for there the debtor gave a bill, which created a new security, and was in itself a sufficient consideration for the agreement to give up the liability of one of the partners. Here there is no such new element. [*Martin*, B.—In *Hart v. Alexander* (e) the Court state that the authority of *Lodge v. Dicas* and *David v. Ellice* is shaken.] It is submitted that the joint and several security of two parties, which necessarily includes the several liability of each, is preferable to it. [*Parke*, B.—That is so where the creditor has the joint and several security of all, but here the plaintiff had only the joint liability of the two.]

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(a) 5 B. & C. 196.

(b) 3 B. & A. 611.

(c) 5 B. & Ad. 925.

(d) 4 My. & Cr. 101.

(e) 2 M. & W. 484.

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POLLOCK, C. B.—We are all of opinion that there ought to be no rule. The reasons of our decision have already been given during the course of the argument. It is not perhaps very easy to distinguish the present case from that of *Lodge v. Dicus*. It may however be observed, that there the matter relied upon as the consideration for the exoneration of one of the partners was the term that the other partner should collect the debts due to the partnership and should pay the plaintiffs' claim; and the Court held that there was no evidence that the plaintiffs knew of this arrangement between the defendants. The plea here in substance states, that the defendant Ault was about to retire from the partnership, and that the other defendant was to remain in it; and that the plaintiff knew these circumstances, and agreed with the defendants to take a certain sum from the defendant Ault, and to release him from all further responsibility, and to look solely to the continuing partner for the payment of the residue of the debt. It is perfectly clear, that the parties had a right to substitute a liability which was altogether different from that upon which the original debt was founded. The Court never does, and indeed cannot, inquire into the adequacy of the consideration of any agreement into which parties may please to enter. But it appears from the pleadings that some consideration exists

and satisfaction, by the debtor agreeing to give something totally different in its nature from the debt, and which the creditor agrees to accept in satisfaction of the debt, the Court cannot inquire into the value of that which is the subject matter of the new agreement; and therefore there is nothing to prevent the parties from agreeing that a horse, or bill of exchange, or any other commodity, shall be given in satisfaction of a larger demand. There is a very strong case to be found in *Dyer*, of *Andrew v. Boughey* (a), where, to a declaration for delivering 373lb. of bad wax upon an assumpsit for 400lb. of good wax, stating half the price to have been paid in hand, the rest to be paid upon a day agreed, a plea of 20lb. of wax given and accepted in satisfaction was held good. The Court proceeded upon the ground that they were not at liberty to go into the value of the consideration of the new agreement, provided the thing differed from the debt itself. The law leaves the parties to their bargain. Now it cannot be doubted that the sole security of one of two joint debtors may be more beneficial than the joint responsibility of both. In the latter case, you are not entitled to sue one with safety, for the defendant may plead in abatement the nonjoinder of his co-contractor. In case of the bankruptcy of one of the partners, there would also be a difference. In the case put by my Lord Chief Baron, of two debtors, where one is a rich old man and the other is young and without property, it might be much more advantageous to the creditor to have his sole remedy against the former, for he would have the security of the personal and real estate of the rich debtor, which he would not have at law in case the old man were to die first. Where there is more than one debtor, the creditor's remedy is different. There is, therefore, no doubt that the thing substituted is altogether different from the original debt. In *Thompson v*

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(a) *Dyer*, 75 a.

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Percival, it is said by the Court of King's Bench, that, in the case of *Lodge v. Dicas*, the difference between the joint liability of two and the separate liability of one does not appear to have been brought under the consideration of the Court. The case of *Lodge v. Dicas* rested upon a totally different ground from the present, for there the consideration for the discharge of the one defendant (*Dicas*) was the allowing the other partner to collect the partnership debts; and the Court held that, as there was no evidence that that fact was known to the plaintiffs, there was no consideration whatever for the plaintiffs' promise; but the point which now arises was not taken by the counsel or acted upon by the Court. This point, however, was much considered in *Thompson v. Percival*, and the decision there was wholly irrespective of the fact that a bill had been given. As I am, therefore, clearly of opinion that the sole responsibility of one of several joint debtors is different from their joint responsibility, the plea discloses a sufficient consideration for the plaintiff's promise to exonerate this defendant from the residue of the debt, and affords a good answer to the action.

ALDERSON, B.—I am of the same opinion. It is demonstrable that the sole security of A. may be a better thing than the joint security of A. and B.: for, by accepting the



poor, in which the advantage of taking A. as the debtor in lieu of A. and B. is clear; or it may be that A. is as rich as B., in which case the creditor may fairly consider that one debtor alone is preferable to both together. If, instead of B., the names of a hundred persons be substituted, these persons must all be made parties to a suit in equity: *Wilkinson v. Henderson* (a), *Thorpe v. Jackson* (b), where Lord Eldon's opinion in *Ex parte Kendall* is quoted. Now, in a suit in equity where a hundred parties are in the suit, the chances of its lasting many years and of its costing much are infinite.

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MARTIN, B., concurred.

Rule refused.

(a) 1 My. & K. 582.

(b) 2 Y. & C. 553.

DOE d. KIMBER v. CAFE.

May 7.

THIS was an action of ejectment, brought to recover one undivided third part of certain premises, described in the

By a will (made before 1838) a testator devised as follows:—

“ I give and devise to A., B., and C., and their heirs and assigns, all that (naming the premises), upon trust, nevertheless, to receive the rents and profits, and, after deducting all taxes and expenses whatsoever, to pay the same unto such persons and for such purposes as my daughter E. M. shall direct, and for want of such direction, to and for her sole and separate use; and from and immediately after the decease of my said daughter, upon trust, to pay and apply the said rents, &c. for and towards the maintenance and education of my said daughter's children then living, during their minority; and upon the youngest living of my said daughter's children attaining the age of twenty-one, I give and devise the said house and premises unto all the children of my said daughter who shall be then living, in equal shares and proportions, share and share alike.” In one of the devises contained in the will, an estate in fee was devised to the testator's grandson, on attaining twenty-one years; and by a concluding clause of the will, the testator, as to the residue of his estate not before specifically disposed of, devised and bequeathed the same to his eldest son, to hold to him, his heirs, executors, administrators, and assigns, according to the nature of the several estates, absolutely for ever; and the testator also authorised his trustees, at their discretion, from time to time to grant leases of any part of the premises in trust, for any term not exceeding twenty-one years, at the best rent that could reasonably be obtained, but without taking any fine for such leases:—*Held*, that the estate of the trustees and their heirs was to continue only for such time as the objects of the trust required it; and that the power to lease was a power only, to be exercised during the continuance of this estate so limited to them; and therefore that the three grandchildren of the testator did not take a fee in the premises in question, but took estates for life only as tenants in common.

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will of James Cole as No. 23, Portland Street, in the parish of St. James, Westminster. After issue joined, by consent, and by a Judge's order, the following case was stated for the opinion of this Court:—

James Cole, being seised in fee simple of the above-named premises, on the 18th of July, 1806, duly made his will, and, after thereby devising certain other property, proceeded in the words following:—"I give and devise to Ann Cole, James Lambly, and James Lodge, and their heirs and assigns, all that my freehold house, No. 23, situate on the south side of Portland Street aforesaid (being the premises in question), now in the occupation of Mr. May, with all the appurtenances thereto; upon trust, nevertheless, to receive the rents, issues, and profits thereof, and, after deducting all taxes and expenses whatsoever, to pay the same quarterly as the same shall accrue and be received, unto such persons and for such purposes as my daughter, Elizabeth M'Intyre, shall in writing, signed with her hand, after every quarter day shall have elapsed, and so as not to be anticipated or disposed of, direct or appoint, and for want of such appointment into the proper hand of my said daughter, to and for her sole, separate, and peculiar use, and not to be liable to the debts, control, engagements, and intermeddling of her present or any future husband; and from and immediately after the decease of my said daughter,



his personal estate, bequeathed his furniture and certain leaseholds to his wife. He then gave and devised certain freehold houses to his son, William Cole, "to hold the same unto my said son and his heirs and assigns, to and for his and their own use and benefit, absolutely for ever." He then devised a freehold house to trustees for the benefit of his grandson, until the age of twenty-one, and then to his grandson, "his heirs and assigns for ever;" but in case of his death before twenty-one, then over to the testator's daughters, equally to be divided between them; but in case either of them died before the grandson, the testator gave the whole to the survivor. Then, after another devise in trust, followed the clause already set out, and on which the question turned. After certain other devises and bequests, the will contained the following clause:—"And as to all the rest, residue, and remainder of my estate and effects not hereinbefore specifically disposed of, I give, devise, and bequeath the same unto my said son, William Cole, to hold to him, his heirs, executors, administrators, and assigns, according to the nature of the several estates, absolutely for ever." The will concluded with the following clause:—"And I do hereby authorise my said trustees, at their discretion, from time to time to grant and execute leases of any parts of my said houses and premises (except those given to my wife absolutely) for any term not exceeding twenty-one years in possession, at the best rent that can be reasonably obtained for the same, but without taking any fine for such leases. And lastly, I do hereby nominate and appoint my said wife, Ann Cole, and the said James Lambly and James Lodge, executrix and executors of my will, &c."

The testator, James Cole, died seised A.D. 1808, leaving his son, William Cole, his heir-at-law, and his daughter, Elizabeth M'Intyre, him surviving.

Elizabeth M'Intyre died in June, 1820, and left three children her surviving, namely George Woodrow M'Intyre,

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Eliza M'Intyre, and Ann M'Intyre, who afterwards, and after the youngest of them had attained the age of twenty-one years (which happened in the month of March, 1835), conveyed all their interests under the will of James Cole in the premises to the defendant, who, in June, 1849, demised the same for a term not expired, to the tenant in possession.

On the 30th of November, 1843, William Cole duly made his will, and thereby devised all his interest in the premises in question to the lessor of the plaintiff.

William Cole died in December, 1843, without having revoked his will.

George W. M'Intyre died in May, 1849, after the said conveyance to the defendant, and after the three children of Elizabeth M'Intyre had respectively attained the age of twenty-one years.

The point for the plaintiff was, that the children of Elizabeth M'Intyre respectively took estates for life only as tenants in common under the will of James Cole; and that, on the death of G. W. M'Intyre, the lessor of the plaintiff became entitled in possession to one undivided third part of the said property.

The defendant's point was, that the three children of Elizabeth M'Intyre took either a legal or an equitable estate in fee as tenants in common or as joint tenants, or

arises does not contain any words of inheritance except as applicable to the trustees, and only to them until the time when the youngest of the grandchildren shall have attained the age of twenty-one. The devise at the end of the clause clearly creates a tenancy for life only in the grandchildren. If that latter devise stood alone, there could be no question. Now that clause is a separate and distinct devise, which is to commence upon the termination of the trust. The trustees, therefore, did not, as will be contended on behalf of the defendant, take an estate in fee, which estate vested in the grandchildren, as being beneficially interested in the subject matter of the trust. *Moore v. Cleghorn* (a) and *Knight v. Selby* (b) will be relied upon by the defendant; but neither on the facts nor upon principle are they authorities in his favour. In both those cases the testator clearly *intended* to give the fee. In the former, *Tindal*, C. J., says—"The question here is, whether, though the artificial words for creating a fee are not to be found, enough appears on the face of the will to shew an intention on the part of the testator that the fee should pass. I think I can see sufficient evidence of an intention that the devisees in remainder should take in fee." And in *Moore v. Cleghorn*, Lord *Langdale*, the Master of the Rolls, says—"By the devise to the three trustees, their heirs and assigns, for ever, the whole estate and interest of the testator in the land passed to them; but the testator declared that the gift was upon trust for the use and benefit of the three boys; everything, therefore, which the trustees took was given to them in trust for the use and benefit of the three boys." In the present case, as the will does not contain any words of inheritance as applicable to the estate which the grandchildren were to take, the estate follows the ordinary rule, and is an estate for life only. It appears also, from other parts of the will, that the testator was not unacquainted with

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(a) 10 Beav. 423.

(b) 3 M. & Gr. 92.

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the true mode of giving a fee. It is unnecessary, at the present stage of the argument, to cite authorities to shew that the trustees do not take a larger estate than is necessary to fulfil the terms of the trust.

The case then stood over, and upon a subsequent day the Court called on

Manisty for the defendants.—The trustees took an estate in fee in the premises in question, and that estate vested in the grandchildren. The present case falls within the rule, that, whenever an estate in fee is devised to trustees in trust for a third party, without any limitation of the estate in the cestui que trust, the latter takes the beneficial interest in fee. This was the ground of the decision in *Challenger v. Sheppard* (a), and was recognised and acted upon in *Knight v. Selby*, and *Moore v. Cleghorn*. Now, looking at the terms of the whole of this will, the general words are not restrained by any expressions indicating an intention that a less estate than a fee should pass to the grandchildren. Lord Chancellor *Cottenham*, in *Moore v. Cleghorn* (b), when before him on appeal, recognises the rule acted upon in *Challenger v. Sheppard* and *Knight v. Selby*, that, where an estate is given to trustees in fee for the use of others, the latter take an estate in fee.

Now, unless the trustees took an estate in fee, the interest

this case, *Abbott, J.*, after stating that, where the words are large enough, the trustees are to take the whole fee, unless it appears by other parts of the will that such was not the testator's intention, proceeds, "The first object of the testator was, that the trustees should make leases for such terms as they might think proper, with this restriction alone, that they must reserve the best improved yearly rent, and take no fine. Now, if these leases were to be made out of their estate, they must have the fee; and, in my opinion, these words are not to be considered as creating a power, but as giving an interest." *Doe d. Keen v. Walbank* (a) is a similar decision, where the Court held that the position of the leasing clause in the will did not affect the question, as "the construction is to be made upon the whole instrument taken together." *Doe d. Shelley v. Edlin* (b) may be also cited as an authority that trustees take that quantity of interest which the purposes of the trust require. The principle expounded in *Watson v. Pearson* (c) and *Blaggrave v. Blaggrave* (d) is not disputed, that the estate which the trustees take, even when given with words of inheritance, need not necessarily be a fee, but need only be co-extensive with the trust to be performed. Words of inheritance are not necessarily any test of the estate which is taken. There is no substantial reason why the parties beneficially interested should not take the fee.

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Bramwell in reply.—The will creates a strict power in the trustees to grant leases. It has been contended that the leasing clause amounts to an intimation to the trustees of the mode in which they may treat the estate. Even if that be so, the power does not enlarge their estate. Where there is a devise to trustees, even with words of inheritance, they shall take only so much of the legal estate

(a) 2 B. & Ad. 554.

(b) 4 A. & E. 582.

(c) 2 Exch. 581.

(e) 4 Exch. 550.

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as the purposes of the trust require. *Doe v. Simpson* (a), *Ackland v. Lutley* (b), *Doe v. Olaridge* (c), *Ackland v. Pring* (d). It is laid down in 2 Jarman on Wills, 208, that an authority to grant leases of an indefinite duration has been in some cases considered to supply an argument for holding trustees to take the inheritance, scarcely less cogent than a direction to sell. And *Doe v. Willan*, and several other cases relied upon by the defendant, are there cited. The words "from time to time" in the clause which give the power to lease, mean at any time during the continuance of the trust. In all the cases relied upon, the intention of the testator that the cestui que trust should take the fee, was manifest upon the will. But here no such intention appears.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—The question in this case turns upon the construction of the will of James Cole, made in the month of July, 1806. The material clause in the will is as follows. [His Lordship read the clause set out at page 676, and proceeded:] The lessor of the plaintiff was the devisee of William Cole, the heir-at-law and residuary devisee of James Cole. The defendant claimed under the three children of Elizabeth McIntyre, all of whom conveyed

had been first for a feme covert, then for the maintenance of her children, then for her children in equal shares and proportions, share and share alike, the children would then have taken a fee, on the authority of the cases of *Moore v. Cleghorn* (a), and *Knight v. Selby* (b). In such a case everything which the trustees took would have been given for the benefit of the devisees, and there would be no resulting trust for the heir.

But it was contended, and we think rightly, that in this case the estate given to the trustees and their heirs was restricted to the life of Elizabeth M'Intyre and the minority of all her children, upon the principle, that, unless a different intention appears, the trustees, though the estate is devised to them and their heirs, take that quantity of interest only which the purposes of the trust require; and the trusts expressed in the devise of the house in question do not require the estate to continue after the youngest child has attained twenty-one, and the devise over is a *direct devise* to the children, not in trust for them; and if this direct devise had stood alone, there can be no question that the children would have taken life estates only as tenants in common.

A direct devise, however, may by the context be shewn not to give the legal estate to the devisee named, and the legal estate may, if the purposes of the will require it, continue in the trustees. The case of *Doe v. Willan* (c), cited for the defendant, is a case of that sort. In that case Mr. Justice Bayley relied on the necessity of the estate continuing in the trustees and their heirs, to support contingent remainders to the children of one of the devisees, as well as on the indefinite power to demise (though for the best rent) as shewing that the estate of the trustees was to continue. In the present case, there is nothing but a leasing power for a limited term and at the best rent, con-

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(a) 10 Beav. 423. (b) 3 M. & Gr. 92. (c) 2 B. & Ald. 89.

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tained in a subsequent clause of the will (which is set out) to shew that the legal estate was meant to continue always in the trustees. We think this is not enough to call upon us to read the direct devise to the children as if it had been a trust in their favour.

It is true that a power to lease affords an argument of weight in favour of the legal estate being intended to be given to the trustees, and especially if it be an indefinite power: *Doe v. Walbank* (a); but it is not conclusive: and in this case there is no necessity, for the purpose of effecting the testator's object, that the trustees should have more than a power, to be exercised whilst the estate, vested in them for the purposes of the trust, continues. The authority to lease extends to all the houses devised to them. In one of the devises an estate in fee is devised to the grandson on attaining twenty-one; and it cannot be supposed it was meant that they should lease for twenty-one years in the event of that estate coming into possession. It seems to us that the most reasonable construction is, to hold that the estate of the trustees and their heirs is to continue only whilst the objects of the trust require it; and that the power to lease is a power only to be exercised during the continuance of the estate so limited to the trustees.

The devise, therefore, to the children is a direct devise to



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May 8.

MEGGISON v. LADY GLAMIS.

SELLS v. SAME.

REPLEVIN of goods and chattels.—Avowry (*a*), that the plaintiff held certain land and premises as tenant thereof to the defendant, by virtue of a demise theretofore made, at the yearly rent of 400*l.*, payable quarterly; and because the sum of 400*l.* for one year of the rent aforesaid was due and in arrear, the plaintiff avows the taking of the goods and chattels as a distress for the rent so due &c.

Plea—non tenuit; upon which issue was joined.

At the trial, before *Parke*, B., at the last Hertfordshire Assizes, it appeared that Lady Glamis, by her agent, entered into an agreement with the plaintiff Meggison, to demise to him the lands in question tithe free, for a term of twenty-one years, at a rent of 400*l.* for the first year and for the second, and for the subsequent years of the term at a rent varying according to the average price of corn. This agreement contained stipulations which were not assented to by Meggison; and in consequence the lease was not prepared. Meggison, however, entered and occupied the premises; and there was evidence that he had agreed to pay a yearly rent of 400*l.*, and that he was to hold the lands *tithe free*. Lady Glamis was lessee of the tithe (which had been commuted under the stat. 6 & 7 Will. 4, c. 71) under a lease for lives from the Dean and Chapter of Westminster, the land itself belonging to her. The value of the tithe was 60*l.* a year. A year's rent being in arrear, the distress in question was made. Previously to the distress, the plaintiff had paid rent at the rate of 400*l.* a year.

It was submitted by the plaintiff's counsel, on the authority of *Gardiner v. Williamson* (*b*), that the agreement

there was a holding at a rent of 400*l.*, as alleged in the avowry.

(*a*) The pleadings and facts of the two cases were similar.

(*b*) 2 B. & Ad. 336.

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Avowry, that the plaintiff was tenant to the defendant, at a rent of 400*l.* a year. At the trial, it appeared that the defendant, being the owner of land and also of tithe commuted under the 6 & 7 Will. 4, c. 71, agreed by parol to demise to the plaintiff the land "tithe free," at a yearly rent of 400*l.*:—*Held*, that, although before the commutation such an agreement might have operated as an agreement to demise both tithe and land at that joint rent, yet, the agreement being after the commutation, the words "tithe free" were surplusage, since by the 80th section of that Act, if the defendant distrained for the rent-charge, the plaintiff would be entitled to deduct the amount from his rent; and, consequently,

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to demise the lands "tithe free," at a rent of 400*l.*, was meant as a demise both of the tithe and the lands at that entire rent, and since the demise was not by deed, the tithe did not pass; consequently there was no certain rent reserved in respect of the land, for which the defendant could distrain. The learned Judge was inclined to that opinion, and directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him.

A rule nisi having been obtained accordingly,

Montagu Chambers, Willes, and Lush, shewed cause (May 4).—The avowry was not proved. The contract was, that the plaintiff should become tenant to the defendant both of the tithe and land, at one entire rent; but the agreement, not being under seal, passed no interest in the tithe: *Gardiner v. Williamson* (a). Prior to the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, if the owner of land and tithe demised the land "tithe free," that operated as a demise of the tithe as well as of the land, and the tenant possessed not a mere indemnity against any claim by his landlord for tithe, but an interest in the tithe itself. If it were otherwise, the tenant would have no security in the event of the insolvency of his landlord. A Court of Equity, in compelling a specific performance of such an agreement,

that would have amounted to an eviction. This, then, being a demise of two distinct hereditaments, at a rent not apportionable, and the demise being void as to one, the lessor cannot distrain for the whole or any part of the rent: *Neale v. Mackenzie* (a).

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James and Rodwell in support of the rule.—The defendant was entitled to distrain. The intention of the parties was, that the land only should be demised at the stipulated rent, with an indemnity to the tenant against any claim for tithe. *Gardiner v. Williamson* (b) is distinguishable, for there the instrument purported in express terms to demise the tithe. Besides, the Tithe Commutation Act materially affects the case. The 67th section provides, that, “from the January next following the confirmation of every such apportionment, the lands of the said parish shall be absolutely discharged from the payment of all tithes,” and a sum of money, in the nature of a rent charge, shall be paid in lieu thereof. Then, by the 80th section, “any tenant or occupier, &c., who shall hold his lands under a lease or agreement, providing that the same shall be holden and enjoyed by him free of tithes, and every tenant or occupier who shall occupy any lands by any lease or agreement made subsequently to such commutation, and who shall pay any such rent-charge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord.” Therefore, the words in this demise “tithe free” are surplusage; for if a distress should be levied on the tenant in respect of the rent charge, he would have a right to deduct from his rent the amount so paid. It follows that, since the statute, the defendant is in precisely the same situation as if the words “tithe free” had not been inserted in the lease.

Cur. adv. vult.

(a) 1 M. & W. 747.

(b) 2 B. & Ad. 336.

1852.
 MEGGISON
 v.
 LADY GLAMIS.
 SHELLS
 v.
 SAME.

PARKE, B. now said (after stating the facts):—At the trial I reserved the question; but it seemed to me at that time, considering only the condition of tithe before the late Act, that if there was an agreement by the owner of tithe for the time being to demise land "tithe free," at a certain rent, (the tithe and land being separate inheritances), it was in effect an agreement to demise both tithe and land at that joint rent; and if, as in this case, the demise was not by deed, no interest in the tithe passed, consequently it could not be ascertained that the land was held at any certain rent for which a distress might be made. Whether that would have been the result if the Tithe Commutation Act had not passed, is a matter upon which, I believe, the Court are not agreed, and upon which it is unnecessary to give any opinion, since that Act has removed all difficulty. The agreement with Mr. Meggison was made after the Tithe Commutation Act came into operation, and there was ample evidence of his agreeing to hold at a rent of 400*l.* a year, not upon the terms of a rent varying according to the price of corn. A distress having been made, the goods were replevied, and there was an avowry by Lady Glamis for rent, at a holding of 400*l.* a year. The question is, whether, this demise being subsequent to the Tithe Commutation Act, at 400*l.* a year, (the intention being that the tenant should not pay a tithe

for this case; for, as Lady Glamis was the owner of the tithes, and it was intended that the tenant should pay 400*l.* a year for the land and not pay tithes, if she afterwards choose to distrain for this tithe rent, she would be compelled to allow that in account. Therefore, we think that there was sufficient evidence, notwithstanding Lady Glamis was the owner of the rent charge substituted for the tithes, that, as between the tenant and Lady Glamis, he was to occupy at a rent of 400*l.* a year; consequently the verdict ought to be entered, pursuant to leave reserved by me, for the defendant in both cases. The rules will therefore be absolute.

Rules absolute.

1852.
 MEGGISON
v.
 LADY GLAMIS.
 SELLS
v.
 SAME.

FIELD *v.* PARTRIDGE.

May 6.

IN this case, the plaintiff, having taxed his costs, signed final judgment and issued execution for debt and costs, without giving any notice of taxation. *Platt*, B., made an order to set aside the judgment and execution, with costs. A rule nisi having been obtained to rescind that order,

The signing judgment for debt and taxed costs, without any notice of taxation, is not an irregularity for which the Court will set aside the judgment.

Wordsworth shewed cause.—The order of the learned Judge was correct. The omission to give notice of taxation renders the judgment irregular. It is true, that in *Lloyd v. Kent* (a), *Coleridge*, J., decided that the taxation of costs without notice was not an irregularity sufficient to induce the Court to set aside the judgment; but in *Perry v. Turner* (b), the Court said, “We have cautiously avoided expressing any opinion as to whether a neglect to give notice of taxation of costs gives the defendant’s attorney a right to set aside the proceedings for irregularity.”

(a) 5 Dowl P. C. 125.

(b) 1 Dowl. P. C. 300; 2 C. & J. 89.


1852.
FIELD
v.
PARTRIDGE.

[*Parks, B.*—In *Taylor v. Murray* (a), we refused to set aside the judgment because no notice of taxation had been given, and I have invariably acted on that rule. *Martin, B.*—The judgment is not necessarily irregular. *Alderson, B.*—If a party chooses to waive his costs, judgment signed for the debt is perfectly regular; then, if the judgment is signed for debt and costs to a greater amount than the party is entitled to, that is only ground for setting aside the judgment as to the excess.]

Willes, in support of the rule, was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that this order is incorrect. The best proof that the judgment is not altogether wrong, may be found in the fact familiar to every one, that a plaintiff may, if he chooses, renounce the costs, and without any taxation at all issue execution for the debt alone. That shews that the judgment, at least to that extent, is right; and if the Court interfere, it ought only to do so in order to correct any error in the taxation.

PARKER, B.—*Taylor v. Murray* settles this point. If it be suggested that the costs are over-charged, the taxation may be reviewed, and then the party who is in the wrong



1852.

April 30.

WHITEHEAD v. LORD, Administrator of ANN LORD,
deceased.

DEBT by the plaintiff, as a solicitor, for services and costs upon the retainer of one Ann Lord, of whom the defendant was the administrator.—Plea, the Statute of Limitations.

At the trial, before *Martin*, B., at the Middlesex Sittings in last Term, the following facts appeared:—In the year 1835, Ann Lord, the deceased, had, as administratrix of her son, been made defendant in a suit in equity by a bill of revivor, and had retained the plaintiff as her solicitor in that suit. In the year 1840, upon the original suit and the bill of revivor coming on to be heard, an order was made, that a supplemental bill should be filed, to make certain persons, who were next of kin, parties to the suit. No supplemental bill, however, was ever filed, nor was any other proceeding taken in the suit. Ann Lord died in June, 1851, and the defendant took out letters of administration; and in July the plaintiff gave the defendant a written notice that, unless the sum of 30*l.* was paid to him for his bill of costs, he should cease to act any longer as solicitor in the suit. The plaintiff claimed in the present action the sum of 68*l.*, for costs and charges due to him up to Michaelmas Term, 1840, when the last proceedings in the suit were taken.

Upon the part of the defendant it was insisted, that the Statute of Limitations barred the plaintiff's claim. Under the direction of the learned Judge, a verdict was found for the plaintiff for 68*l.*, leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for the defendant.

As a general rule, an attorney or solicitor, retained to conduct a suit, is under the obligation to carry it on to its termination, and he cannot sue for his bill of costs until that period has arrived. He may, however, give a reasonable notice to his client to supply him with adequate funds; and in case of refusal, he may sue him for his costs. The retainer is also determined by the death of the client.

A solicitor was retained in a Chancery suit in which his client was a defendant, and an order was made by the Court that a supplemental bill should be filed, to make certain persons, next of kin, parties to the suit; no decree was ever made, nor was there any further step taken in the suit. Upwards of ten years after this order had been made, the soli-

citor's client died:—*Held*, in an action by the solicitor against the representative of the client for his bill of costs up to the time when the order was made, that the debt was not barred by the Statute of Limitations.

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WHITEHEAD
v.
LORD.

In last Term, *Phipson* obtained a rule nisi accordingly.

Bramwell and *Gray* shewed cause.—As a general rule, an attorney or solicitor, who is retained to conduct a suit, is bound to carry it on to its termination, and he cannot sue for his bill of costs until such period. This rule, however, is subject to the qualification, that the client is bound to furnish his solicitor with suitable funds; and if, after a reasonable notice, the client neglects to provide the funds, the solicitor may abandon the suit and sue for his charges: *Harris v. Osbourn* (a), *Vansandau v. Browne* (b), and *Williams v. Jones* (c). The attorney has the remedy in his own hands; for, if he requires funds, and they are not supplied, he may put an end to the retainer. But the lengthened period for which the suit may happen to be protracted does not of itself give him any right of action. The only additional fact in this case is, the order for the supplemental bill. This did not determine the suit, but was, as the term implies, a continuation of the original suit. Neither did it create a fresh retainer. The supplemental bill was a mere step in the cause: 1 Daniel's Chancery Prac. 789; Mitford on Pleading, 66. The retainer here was not determined except by the death of the plaintiff's client, Ann Lord; and that event occurred within six years of the commencement of the suit. The Statute of Limitations is therefore no bar to

which might arise. That there may be other exceptions appears from *Nicholls v. Wilson* (a), where Lord Abinger, C. B., says, "It is possible to conceive circumstances under which an attorney might be justified in abandoning proceedings without any notice." And *Parke*, B., says, that "a case might occur so plain as not to require notice." It is not necessary to contend that the cause should be discontinued. [*Parke*, B.—The point is reduced to this simple question,—at what precise moment did the plaintiff's right of action accrue?] When the proceedings or the machinery of the suit came to such a dead lock that there existed no probability whatever that they could be set in motion again, so as to determine the suit within any reasonable time, the plaintiff had a right, within a reasonable time after that period, to sue his client for his charges. Here the suit fell asleep in 1840, without the least likelihood of its awaking for many years, if ever. [*Pollock*, C. B.—What do you say is a reasonable time?] The precise time at which the suit became practically ended would be a question for the jury; and the question, what would be a reasonable time after that event had occurred, would be a matter for the Court. It would also seem that the order for a supplemental bill determines the original retainer.

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 WHITEHEAD
 v.
 LORD.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. The question has been fully discussed, and the simple point is, whether the plaintiff's claim is barred by the Statute of Limitations, the suit in which he was retained not having been terminated, and no notice having been given by him that he would not proceed with it. Mr. *Phipson* has relied upon what fell from the late Lord Abinger and my Brother *Parke*, in the case of *Ni-*

(a) 11 M. & W. 106

1862.
WHITEHEAD
v.
LORD.

choffe v. Wilson, namely, that there may be circumstances which would dispense with such a notice. But I do not think that the present case forms any exception whatever to the general rule, that as long as the suit is going on, so long is the attorney bound to attend to it; and he cannot sue for his costs during such period, unless some communication takes place between him and his client, by which the retainer is so far put an end to as to give him a right of action. It could not be left to the jury to say whether the cause had not been brought to such a difficult and perplexing pass as to afford no reasonable prospect of arriving at a termination, and therefore to be considered, for all practical purposes, as brought to a conclusion. Here the plaintiff's cause of action did not arise before the death of the client, and therefore the debt was not barred by the statute.

PARKER, B.—I am of the same opinion. The rule, as applicable to this case, was correctly laid down in *Harris v. Osbourn*, that an attorney, under a retainer to conduct a suit, undertakes to conduct the suit to its final termination, and he cannot sue for his bill until that time has arrived, subject, however, to the exception there stated, and subject also to the additional exception which arises upon the death of the client, in which case he can sue the

ative after her decease. The plaintiff's claim is therefore not barred by the statute, and this rule ought to be discharged.

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WHITEHEAD
v.
LORD.

PLATT, B.—I am of the same opinion. There is no doubt that an attorney, who has been retained to conduct a suit, cannot stop in the middle of it; and, as he has taken upon himself a certain responsibility, he is bound to fulfil it; but the client is equally bound to furnish him with funds necessary for the purpose, if he requires them. That being so, what is the present case? The plaintiff became solicitor for his client in a Chancery suit, in which there was an order to file a supplemental bill; but no decree was ever made in the suit, which has been asleep, without any step having been taken in it for so many years. The client has lately died; and then, for the first time, arose the plaintiff's right to sue.

MARTIN, B.—The plaintiff's right to sue did not date from the time of the retainer, and no definite period can be pointed out when he could have sued before the death of his client.

Rule refused.

1853.

April 22.

HUMPHREYS and Another v. PEARCE.

Where matters in difference in a cause involving several issues are referred to arbitration, the costs of the cause to abide the event, the award is good notwithstanding there is no specific finding on each issue, if it appear by necessary intentment that the arbitrator has disposed of all the issues.

Seemle, that it is otherwise where the reference is of the cause and also of matters in difference.

THIS was an action of debt, to recover the sum of 149*l.* 17*s.* 6*d.* for the keep of horses, standing of carriages, &c. The declaration contained several indebitatus counts, to which the defendant pleaded, first, except as to 42*l.*, never indebted; secondly, except as to 42*l.*, a set-off; thirdly, except as to 42*l.*, payment; fourthly, as to 42*l.*, payment of 42*l.* 1*s.* into Court, and no damages ultra. The plaintiffs took the money out of Court, and denied the set-off and payment. After issues joined, all matters in difference in the cause were referred to an arbitrator, the costs of the cause and of the reference and award to abide the event. The arbitrator awarded *de præmissis* as follows:—"I do award and order that the said J. Pearce shall and do pay or cause to be paid to the said R. Humphreys and J. Humphreys the sum of 84*l.* 14*s.* 2*d.* over and above the sum of 42*l.* paid into Court by the said J. Pearce; which I do adjudge and award to be due from the said J. Pearce to the said R. Humphreys and J. Humphreys, for and upon the matters in difference to me referred as aforesaid."

G. Atkinson moved to set aside the award, on the ground that it was not final. The arbitrator ought to have found

been of "all matters in difference between the parties to the cause," there would be ground for arguing that the award was bad; for the sum might have been awarded in respect of the matters in difference only.] In *Kilburn v. Kilburn* (a), where the declaration contained several counts, it was held, that non assumpsit raised a distinct issue upon each count, which the arbitrator was bound to decide. [Parke, B.—That was a reference of the cause and also of all matters in difference; and the arbitrator merely awarded that the defendant was indebted to the plaintiff in a certain sum; but whether that was the sum for which the action was brought, or whether it was a matter in difference ultra the action, did not appear; so that there was no means of taxing the costs of the action. Here the arbitrator finds that the plaintiffs are entitled to a certain sum upon all the causes of action.] *Brooks v. Parsons* (b) was a reference of the cause only; and Patteson, J., held, that "the direction to an arbitrator to find a verdict, meant that he must find one according to law, that is, specifically upon each issue." [Martin, B.—In Russell on Arbitration, p. 348, it is said, "In one case (c), where there were several special inconsistent pleas, the Court treated the awarding a general verdict for the defendant as a finding on all the issues in his favour; and in a very recent case, Parke, B., said, that awarding a general verdict for the plaintiff means, a verdict on all the issues (d). The distinction is, where the reference is of the cause only, and where it is of the cause and also of matters in difference."]

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 HUMPHREYS
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POLLOCK, C. B.—There will be no rule. In my opinion, some of the cases on this point cannot be sustained. The correct principle is, that, if there be a reference of a cause involving several issues, and it can be discovered upon the

(a) 13 M. & W. 671.

(b) 1 D. & L. 691.

(c) *Cooper v. Langdon*, 9 M. & W. 60.

(d) *Dresser v. Stansfield*, 14 M. & W. 822.

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award that every issue must have been considered by the arbitrator, that is sufficient, without a specific finding on each. Therefore, if an arbitrator, as here, directs that, upon the whole matters in difference in the action, the plaintiff is entitled to a certain sum, that disposes of all the issues.

PARKER, B.—In this case, by necessary intendment, there is a finding upon every issue; for the arbitrator awards that 84*l.* 14*s.* 2*d.* is due in respect of the matters referred, over and above the 42*l.* paid into Court. That disposes of the issues on the pleas of payment and set-off; for if the defendant had proved a set-off and payment beyond the 42*l.*, the arbitrator could not have found that 84*l.* 14*s.* 2*d.* was due. The set-off is only material as a matter in difference in the cause; and the question, whether the defendant had a set-off, will depend upon the sum which is awarded to the plaintiffs; therefore, the arbitrator must have found both the pleas in the negative, for otherwise the plaintiffs could not be entitled to 84*l.* 14*s.* 2*d.* beyond the sum paid into Court. It is enough to say that it appears, by necessary intendment, that all the issues are disposed of. I am inclined to think that the case of *Brooks v Parsons* would not have been decided by my Brother *Patteson* in the same manner at the present day.

good, notwithstanding there is no specific finding on each issue, if it appear by reasonable intendment that the arbitrator has determined all the issues in the plaintiff's favour. I am glad it has been so decided, because it is clear that, when an arbitrator finds that the plaintiff is entitled to a certain sum, he must mean "upon all the issues joined in the cause."

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HUMPHREYS
v.
PEARCE.

Rule refused.

FOWLES v. THE GREAT WESTERN RAILWAY COMPANY.

April 15.

CASE.—The declaration stated, that the defendants were the owners and proprietors of The Great Western Railway, and of certain engines and carriages used thereon, and carried on the business of common carriers thereon and elsewhere; and that the plaintiff caused to be delivered to the defendants as common carriers, and the defendants received as such common carriers, divers, to wit, twenty boxes, containing therein magic lanterns, &c., of the plaintiff, of great value, &c., to be safely and securely carried and conveyed for the plaintiff by the defendants from the city of Bristol upon the said railway, and otherwise, and to be by the defendants delivered to the plaintiff at a certain place, to wit, Brompton, in the county of Middlesex, for certain reward, to be therefore paid by the plaintiff to the defendants.—Breach, that the defendants, not regarding their duty, did not nor would use due and pro-

The plaintiff delivered at Bristol to the defendants (a Railway Company) certain goods, and took from them a receipt note, which stated that the goods were received to be conveyed by the Company as below, and on the conditions stated on the other side. Then followed a statement that "Bristol" was the station from which, and "Paddington" the station to which, the goods were to be car-

ried, and that the plaintiff's address was at "Brompton." One of the conditions stated, that goods addressed to consignees resident beyond the immediate vicinity of the Company's Goods Stations, would be forwarded by public carrier or otherwise, as opportunity might offer; but that the delivery of the goods by the Company would be considered as complete, and the responsibility of the Company cease, when such carriers received the goods; and that the Company would not be responsible for loss or damage to goods beyond the limits of their railway. The goods in question were safely conveyed by the defendants to their London terminus at Paddington, and there given over to a person specially appointed by them for the collection and delivery of goods; and, through the negligence of his servant, were damaged on their delivery at the plaintiff's house at Brompton. The defendants made one entire charge for the carriage from Bristol to Brompton:—*Held*, that the defendants were not liable for the damage; and consequently, a declaration, which stated that they as common carriers received the goods to be carried from Bristol to Brompton, could not be supported.

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per care in and about the carriage and conveyance of the boxes, &c., and the delivery thereof; but so carelessly and negligently conducted themselves, that the boxes and the goods contained therein were, through the carelessness and negligence of the defendants, thrown and dashed violently to the ground, and divers glass goods were broken &c.

Plea (inter alia).—That the plaintiff did not cause to be delivered to the defendants, nor did the defendants receive, the said boxes, to be safely and securely carried and conveyed, and to be delivered, as in the declaration mentioned, modo et formâ.—Upon which issue was joined.

At the trial, before Lord *Campbell*, C. J., at the Bristol Summer Assizes, 1851, it appeared that one King, an agent of the plaintiff, took to the Bristol station of the Great Western Railway Company certain goods for carriage to London. At the time he delivered the goods to the clerk at the station, he signed the following receipt note:—

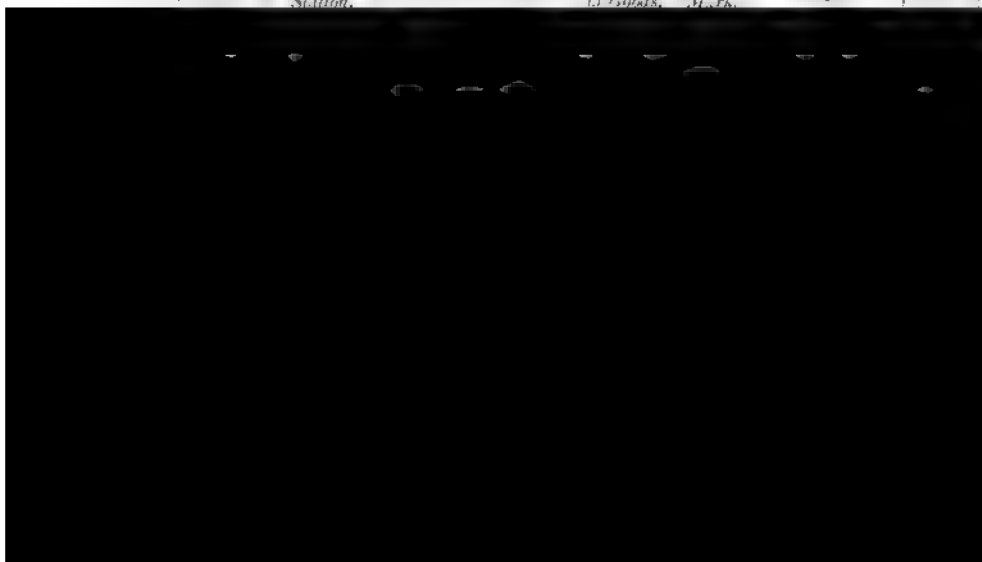
“ Bristol Station, May 2nd, 1851.

“ Great Western Railway.

“ To the Great Western Railway Company.

“ Received the under-mentioned goods from Mr. Joseph King of Bristol, to be conveyed by the Great Western Railway Company as mentioned below, and on the conditions stated on the other side.

From what	To what Station.	Name and Address.	Description of Goods.	No. or Mark.	Weight.	Remarks.
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On the other side of the receipt note were printed the following (among other) conditions:—

“THE GREAT WESTERN RAILWAY COMPANY

“GIVE PUBLIC NOTICE:—

“Seventhly—That all goods received by the Company within the limits of their local regulations for conveyance on their railway, will be received and booked without charge for collection; and that all goods addressed to consignees resident within the limits of delivery from the Company’s Goods Station, and respecting which no directions to the contrary shall have been received, will be delivered without any additional charge by the Company at those places.

“Tenthly—That all goods addressed to consignees resident beyond the immediate vicinity of the Company’s Goods Station, and respecting which no directions to the contrary shall have been received previous to arrival at the station-house, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer; or they will, at the discretion of the Company by whom they have been received, be suffered to remain on the Company’s premises, or be placed in shed or warehouse, if there be convenience for receiving the same, pending communication with the consignees, at the risk of the owners. But that the charges of such carrier will be added to those of the Company, and the delivery of the goods by the Company will be considered as complete, and the responsibility of the Company will be considered to have ceased when such carriers shall have received the goods for further conveyance. And the Company hereby give notice, that any money which may be received by them as payments for the conveyance of goods by other carriers beyond their own railway, will be received only for the convenience of the consignors, for the purpose of being paid to such other carriers, and will not be received as a charge made by the Company upon the goods in the capacity of carriers beyond the extent of their own railway. And the Company hereby give further notice, that they will not be responsible for any loss, damage, or detention that may happen to goods so sent by them, if such loss, damage, or detention occur beyond the limits of their respective railway.”

The goods in question were safely conveyed by the defendants to the London terminus of their railway at Paddington, where they were delivered to one Sherman, who was specially appointed by the Company for the collection and delivery of goods at the London terminus, in order that he might deliver them to the plaintiff at Brompton. The

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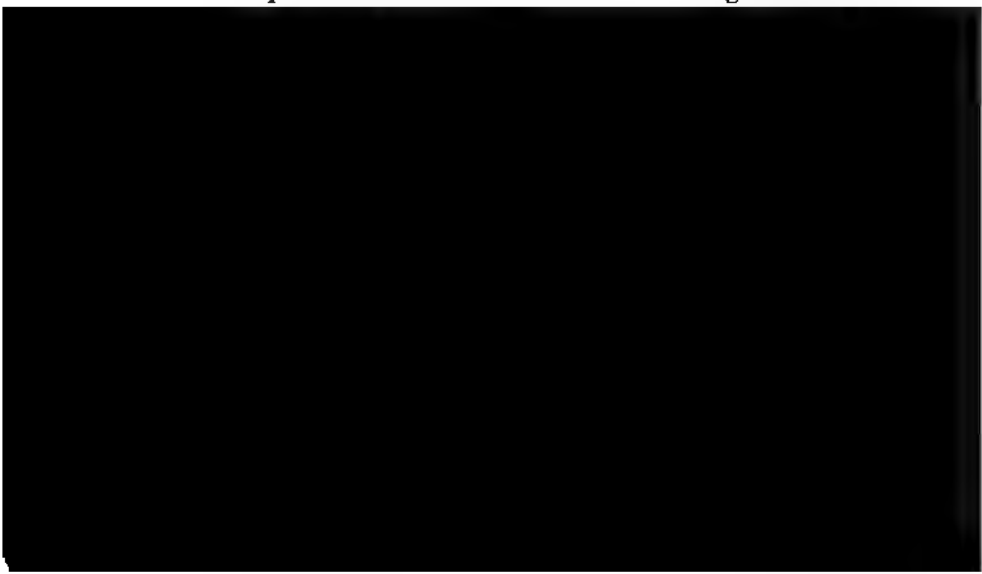
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goods were accordingly placed in Sherman's cart and taken to the plaintiff's residence at Brompton; but the carman, in lifting them from the cart, let the case, which contained glass goods, fall upon the pavement, and so caused the damage complained of. The sum charged by the defendants for carriage included the carriage from Paddington to Brompton.

It was objected, on the part of the defendants, that the declaration was not proved, inasmuch as it alleged a contract to carry from Bristol to Brompton, whereas the evidence shewed a contract to carry from Bristol to Paddington. The learned Judge, however, left the case to the jury, and a verdict was found for the plaintiff.

Butt, in the following Michaelmas Term, obtained a rule nisi to enter a verdict for the defendants, or for a new trial(a); against which

Kinglake, Serjt., shewed cause.—There was evidence of a contract to carry from Bristol to Brompton. The receipt note contains the plaintiff's address at Brompton—the place where the goods were to be delivered. It is true that Paddington is mentioned as the London station to which the goods were to be conveyed; but there is nothing to prevent the defendants from becoming carriers from



case of *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company* (a), inasmuch as there the common law liability of the defendants never attached.

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Butt and *Montague Smith* appeared to support the rule. But it having been suggested that it did not appear from the report of the learned Chief Justice whether he had reserved leave to enter a verdict for the defendants on that point—

POLLOCK, C. B., said.—We will consult the Lord Chief Justice, as to whether the point was reserved; and unless it was not, we shall give effect to the motion to enter the verdict for the defendants. There is clearly a variance in the statement of the contract, and no amendment would be of any avail, even if we had the power to make it. The goods were delivered at Brompton, which is beyond the limits of the London terminus of the railway, and one entire charge was made for the carriage. Then the tenth condition in the receipt note applies; from which it is evident that the contract, which was made at Bristol, was a contract to deliver the goods, not at Brompton, but at Paddington.

PARKE, B.—I am of the same opinion. There is clearly a variance in the description of the place at which the goods were to be delivered. The declaration states, that the defendants, as common carriers, undertook to carry the goods from Bristol to Brompton. The contract, which depends upon the terms of the receipt note, is a contract to carry from Bristol to Paddington. The only difficulty arises from the insertion in pencil of the address of the plaintiff as the person to whom the goods were to be delivered, which is at a place beyond the limits of the railway


(a) 20 L. J., Q. B., 440.

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terminus. But then, in the receipt note, under the head "From what station," there is "Bristol;" and under the head "To what station," there is "Paddington:" and one of the conditions on the other side of the receipt note is, that the Company are not to be responsible for the carriage of goods beyond the limits of their stations. It seems to me, that the words in pencil are a mere memorandum of the address of the person for whom the goods are to be carried. No amendment could be made, because the goods were safely carried from Bristol to Paddington, and the damage was occasioned by the negligent delivery at Brompton.

PLATT, B.—I am of the same opinion. The goods were received by the defendants to be carried upon the terms and conditions mentioned in the receipt note; and it is plain that, by the tenth condition, the Company have expressly shielded themselves from all responsibility for the carriage of goods beyond the limits of their stations.

MARTIN, B.—The contract stated in the declaration is, that the defendants as common carriers undertook to carry the goods in question from Bristol to Brompton. The plea is, that the defendants did not receive the goods for that purpose, and I am of opinion they did not. The goods



they would be liable; but when they ceased to have any control, they would have no further responsibility.

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The Court having, on a subsequent day, stated that the Lord Chief Justice had informed them that he had not reserved this point, the case came on for argument on other objections in the following Term (June 11), when, on the suggestion of the Court, counsel on both sides consented to a *stet processus*.

CROUCH *v.* THE LONDON AND NORTH WESTERN RAILWAY
COMPANY.

April 28.

CASE.—The first count of the declaration stated, that the defendants were common carriers of goods for hire, from Liverpool to Dublin; and that the plaintiff, on &c., caused to be delivered to the defendants, as such common carriers as aforesaid, and the defendants, as such common carriers, received, a package containing divers goods, to wit, &c., to be safely and securely carried and conveyed by the defendants for the plaintiff, from London to Dublin, and at the said last-mentioned place to be delivered by the defendants for the plaintiff, within a reasonable time in that behalf; and that it thereupon became the duty of the defendants safely and securely to carry and keep the package. Breach, that the defendants did not safely and securely carry the package; but that, through their negligence, the package and its contents were lost.

To an action on the case, in which the declaration stated that the defendants were common carriers, and that they received from the plaintiff, as such common carriers, a certain package, to be safely carried and to be delivered for him at a place mentioned, and that the defendants did not safely carry the package, but that through their negligence it was lost; the defendants pleaded that, at the time they received the package, they

Plea, that, at the time when &c., the defendants gave notice to the plaintiff that they would not carry any pack-

gave the plaintiff notice that they would not be responsible for packages of a particular description, under which this particular package fell, unless their contents were declared; and that the contents of this package were not declared; and that the defendants did not consent to be responsible contrary to the terms of such notice.—*Verification:—Held*, that the plea amounted to an argumentative denial of the bailment as alleged in the declaration.

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CROUCH
v.
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NORTH
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age containing several packages collected from different parties, and addressed to and intended for several different parties, although inclosed in one package and addressed to one party, unless the addresses on the inclosed packages and their contents were declared; and further, that the defendants would not be responsible for any such package or the contents, unless such declaration should be made, and the particulars declared; and that the defendants carried on their business on the terms contained in the said notice; that the package inclosed three parcels, received by the plaintiff from three different parties; and the parcels were addressed to and intended for three different parties; and that the fact that the package contained such parcels was not declared to the defendants; and that the defendants received the package on the terms of the notice, which the plaintiff well knew; and that the defendants never consented to subject themselves to any responsibility contrary to the terms of the said notice.—Verification.

Special demurrer, assigning, amongst other causes, that the plea denied argumentatively that the package was delivered to and received by the defendants as common carriers.—Joinder in demurrer.

J. Brown, in support of the demurrer, contended that



a plea of its being argumentative, the objection was held to be answered by the fact, that the defendants there did not by the terms of their notice stipulate to carry goods of any description unless insured.—He also relied upon *Austin v. Manchester, Sheffield, &c. Railway Company* (a), as being in point.—The Court then called upon

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Atherton to support the plea; and he endeavoured to distinguish the case from that of *Shaw v. York and North Midland Railway Company*. But

THE COURT were most clearly of opinion, that the objection to the plea was good, and that the plaintiff was entitled to judgment.

Judgment for the plaintiff.

(a) 20 L. J., Q. B., 440.

CARR v. THE LANCASHIRE AND YORKSHIRE RAILWAY
COMPANY.

May 7 & 8.

CASE.—The declaration stated, that the defendants were the owners of the Lancashire and Yorkshire Railway, and were possessed of engines, horse-boxes, &c., for conveying passengers, horses, cattle, &c., on the railway as common

A contract entered into with a common carrier by the party who delivers goods to be conveyed, by which contract

the carrier is exempted from all liability for any loss occasioned by his negligence, is binding upon both parties.

A declaration stated, that the defendants were the owners of a certain Railway, and that they conveyed horses and cattle thereon as common carriers; that the plaintiff delivered to the defendants a horse, to be carried by them for hire on their Railway from A. to B., subject to certain conditions assented to by the plaintiff, and contained in a notice at the foot of the ticket of the defendants' Company for the conveyance of the horse; which ticket stated that it was issued subject to *the owner's taking all risks of conveyance whatsoever, as the Company would not be responsible for any injury or damage (howsoever caused) occurring to live stock travelling upon their line.* The declaration then stated, that, whilst the horse was in the custody of the defendants, it was injured by the horse-box, in which the animal was, being propelled against some trucks, through the gross negligence of the Company:—*Held*, that the defendants had engaged to carry the plaintiff's horse under a special contract, the terms of which were contained in the notice; and that, by that notice, the plaintiff had agreed that the defendants should not be responsible for such a loss, although it were occasioned through their negligence; and consequently, that the declaration was bad after verdict. *Platt, B., dubitante.*

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carriers; that the plaintiff delivered to the defendants a horse, to be carried by them for hire in a horse-box, on their railway from Wakefield to Knottingley, subject to certain conditions assented to by the plaintiff, and contained in a notice at the foot of the ticket or way-bill of the Railway Company for the conveyance of the horse, and which was in these words:—"This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the Company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway or in their vehicles." The declaration then proceeded to allege that, whilst the horse was in the custody of the defendants, and through the improper conduct and gross negligence, and from the want of proper care, skill, and diligence on the part of the defendants, the horse-box was propelled on the railway against certain trucks with so great violence that the horse was seriously damaged, and died in consequence thereof.

Plea, not guilty, and issue thereon.

At the trial, before *Alderson*, B., at the last York Assizes, the jury found that the loss had been occasioned by the gross negligence of the defendants, and returned a verdict for the plaintiff, with 87*l.* damages.

A rule nisi having been obtained to arrest the judg-

carriage of which he is entrusted, but he has also the responsibility of an insurer cast upon him. From the latter liability he is relieved by two things only—namely, by the act of God and of the king's enemies. He is therefore bound to use reasonable care; and he cannot, except for an adequate consideration, relieve himself of this duty which the law has imposed upon him. In the well-considered case of *Wyld v. Pickford*(a), the various authorities upon this subject are to be found, and, amongst others, the following:—*Beck v. Evans*(b), *Bodenham v. Bennett*(c), *Riley v. Horne*(d), *Ellis v. Turner*(e), *Garnett v. Willan*(f), *Sleat v. Fagg*(g), and are commented upon by the counsel; and it is said that, “in Story on Bailments, 365, the rule is laid down in conformity with these authorities—viz. that, notwithstanding such a notice as the present, a carrier is not protected from losses occurring through gross negligence.” And in the judgment of the Court it is said, that “probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable, as upon the custom of England, for the remainder.” Freedom from liability, in the case of gross negligence, is wholly inconsistent with the carrier's duty as such.—[*Parke, B.*—Does the principle upon which the plaintiff now endeavours to rest his case apply? If he had sought to enforce the defendants' obligation as common carriers, he ought to have tendered a reasonable compensation for the carriage of the chattel; and, upon their refusing to receive it, he might have sued them upon their common-law liability. But, instead of doing so, he has entered into a special contract with the defendants; and subject to the conditions of that contract the latter agreed to carry and to deliver the chattel entrusted to them. After having

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(a) 8 M. & W. 443.

(b) 16 East, 244.

(c) 4 Price, 31.

(d) 5 Bing. 217.

(e) 8 T. R. 531.

(f) 5 B. & Ald. 53.

(g) Id. 342.

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entered into that bargain, the plaintiff cannot turn round and say that it is not binding upon him. There is nothing illegal in it. The best argument the plaintiff can make use of with reference to the carrier's liability at common law is, that as he is in such case liable for gross negligence, this contract cannot be construed as exempting him from it.] Then one question will be, whether it is stated upon this record that the parties entered into a contract upon the terms contained in the notice, which was given at the time the chattel was delivered. Before the Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, it was necessary to shew distinctly that the notice was brought home to the knowledge of the sender; and unless this was done, the notice did not avail the carrier.—[*Parke, B.*—Surely it is here stated that the parties entered into a special contract. It was so held in *Chippendale v. Lancashire, &c., Railway Company (a)*. His Lordship also referred to *Shaw v. York and North Midland Railway Company (b)*.] If, then, this is to be taken as amounting to a contract, exemption from liability on account of gross negligence must be excepted out of it. The contract does not expressly state that the defendants are not to be liable in that case. Even if this proviso had been inserted, it is questionable whether such a condition could be considered as binding, inasmuch as it is wholly repugnant to the validity of the defendants' under-

Court that the Court of Common Pleas had, during the course of the argument in the present case, held the declaration in a similar case of *Austin v. Manchester, &c., Railway Company* (a) insufficient after verdict, and had made a rule obtained to arrest the judgment absolute; and a note of that judgment was handed up to the Court.]

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Wilkins, Serjt., and *Tomlinson*, in support of the rule, were not called upon.

PARKE, B.—I am of opinion that the rule which has been obtained in this case to arrest the judgment ought to be made absolute. The question wholly turns upon the true construction of the notice at the foot of the ticket or way-bill, which was given by the defendants and was assented to by the plaintiff, and which forms the foundation of the contract between the parties. In the first place, it is perfectly clear that, since the passing of the Carriers Act, it is competent for a carrier to make a special contract to convey goods and chattels; and it is clear that the liability of the latter may be made to depend upon the terms of that contract into which both parties have entered. Here the parties have entered into a special contract, and consequently the only question is as to the meaning of that contract. According to the old cases, the construction of carriers' notices had this limitation put upon them, that, according to the ordinary terms of the notice, he would be responsible for gross negligence, unless he excluded his liability in express terms. The practice of a carrier protecting himself by a mere notice, was put an end to by the Carriers Act. Now, whether or not these defendants are liable as common carriers, according to the rule of the common law, that is, whether they are bound to carry safely and securely, and are only protected from that de-

(a) 16 Jur. 763.

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scription of loss which arises from the act of God and the King's enemies, is a question which there is no necessity to discuss upon the present state of this record. If it had been the intention of the plaintiff to make the defendants liable as common carriers, he ought to have tendered them a reasonable sum for the carriage of the chattel, and, upon their refusal to carry, to have brought his action for not carrying. Whether the plaintiff would or would not then have succeeded, is a matter into which we need not enter. Most certainly, every common carrier is bound only to carry goods of that description which his public calling requires him to carry. That is established by the case of *Johnson v. The Midland Railway Company* (a). But we are not called upon to consider the duties of the defendants in that character, inasmuch as these parties have entered into a special contract, and we have only to inquire into its true meaning. Prior to the time of the establishment of railways, the Courts were in the habit of construing contracts between individuals and carriers much to the disadvantage of the latter. By the introduction of railways, a new description of property was carried, and many articles are now transferred from one place to another which had not been commonly carried before. Sheep and other cattle are now ordinarily carried upon railways;


gine, and various other matters, are apt to alarm them and to cause them to do injury to themselves. It is, therefore, very reasonable that carriers should protect themselves against loss by making special contracts. The only question here is, whether the defendants have protected themselves against loss arising from their gross negligence in carrying the plaintiff's horse. The jury have found that the defendants have been guilty of gross negligence; and therefore it may be taken upon this record that the breach, if any, of the contract was so occasioned. Now, I am of opinion that, by entering into this contract with reference to the subject-matter, the owner has taken upon himself all risk of conveyance, and that the railway company are bound merely to find carriages and propelling power. The contract appears to me to amount to this. The Company say they will not be responsible for any injury or damage, *however caused*, occurring to live stock of any description travelling upon their railway. This, then, is a contract by virtue of which the plaintiff is the party to stand all risk of accident and injury of conveyance; and certainly, when we look at the nature of the thing conveyed, there is nothing unreasonable in this arrangement. In the case just decided by the Court of Common Pleas, of *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, the language of the contract was slightly different from the present. There the ticket was issued "subject to the plaintiff's undertaking to bear all the risks of injury by conveyance and other contingencies, and the plaintiff was required to see to the efficiency of the carriages, and the defendants were not to be responsible for any damage caused to horses" &c. travelling upon the railway. In that case, the accident was occasioned by the wheels not being properly greased; in the present case, the carriage that contained the plaintiff's horse was driven against another carriage. For the purposes of this decision, these two notices may be considered as in effect the same. It

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is not for us to fritter away the true sense and meaning of these contracts, merely with a view to make men careful. If any inconvenience should arise from their being entered into, that is not a matter for our interference, but it must be left to the legislature, who may, if they please, put a stop to this mode which the carriers have adopted of limiting their liability. We are bound to construe the words used according to their proper meaning; and, according to the true meaning and intention of the parties as here expressed, I am of opinion that the defendants are not liable.

ALDERSON, B.—I am of the same opinion. In this case the defendants undertook to carry the chattel in question on certain terms. What, then, are those terms? It is clear they are such as the defendants might lawfully make the subject of a special contract. It is plain to me, that they undertook to carry the plaintiff's horse at his risk. They might do that. The words used are, "the owners undertaking all risk of conveyance whatsoever." Possibly a question might be made whether the injury contemplated was not such as must issue in injury to the thing conveyed, so that a doubt might arise whether the case of the horse being stolen was contemplated, as, under such circumstances, the accident would not issue in injury to



which they received the plaintiff's horse absolve them from the loss occasioned by their misconduct. Now, undoubtedly, since the establishment of railways, new subjects of conveyance have arisen. Formerly horses were seldom carried, but now they are ordinarily conveyed by the trains. It is therefore to be observed, that new stipulations are necessarily made, in order to guard carriers from the risks which are incidental to this new mode of conveyance. It has been suggested, that the animal may be alarmed by the noise of the engine, by the speed of the carriages, and by various other causes; that this ticket provides against such new dangers; and that, unless we take upon ourselves the office of legislation, this ticket absolves the carriers from their gross misconduct. I own I am very much startled by such a proposition; though, considering the high authority by which it is supported, I feel I ought to doubt and mistrust my own opinion. But I am bound to say, that I am not satisfied that the language of this ticket absolves the railway company from such liability for damage. I cannot help thinking, that the owner of the goods never dreamed of such a thing when he signed the contract. In truth, this accident had nothing to do with the conveyance of the horse. The accidents referred to are those which occur whilst the article is in a state of locomotion. The case of gross negligence, as it seems to me, is not pointed at by this ticket.

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MARTIN, B.—I agree in opinion with my Brothers *Parke* and *Alderson*. It is perfectly clear that this is the case of a special contract, which the plaintiff has adopted and assented to, and has set out in his declaration; and by that contract he agreed that the horse in question was to be carried upon certain conditions. No doubt, at common law, a carrier may enter into a special contract. He may, it is true, be bound to carry goods; and if he refuses to do so, except on the terms of a special contract, he may subject himself to an action for that breach of duty; but

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if a special contract be entered into by him and the party sending the articles to be conveyed, both sides are bound by the terms of the contract. The Carriers Act says that a special contract may be made. If that be so, all that we have to do is to see what that contract is. Insurers of goods to be conveyed are answerable for the gross negligence of the carrier or of his servants, whether the goods be insured or not; the parties who have the care of such goods may contract that they will not be answerable for their own gross negligence. It seems to me, that the parties here could not have used language more clear or stronger than that which they have adopted. We cannot enter into the question of what was passing in the mind of the owner of the horse at the time he assented to these terms; we must look only at the notice. Now, if the carrier had been desirous of preparing a contract for the express purpose of getting rid of his liability in respect of gross negligence, he could not have used more apt words than those that are set forth upon the face of this document. The argument of inconvenience is no test of the matter. We have nothing to do except to carry out this contract; the parties concerned, and not ourselves, are to judge of the inconvenience. If we hold the carriers in this case responsible for gross negligence, we shall place

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CLAY and NEWMAN v. SOUTHERN.

April 19.

ASSUMPSIT for goods sold and delivered, and on an account stated. Plea, non assumpsit.

At the trial, before *Platt*, B., at the last Worcestershire Assizes, it appeared (inter alia), that the action was brought to recover the value of brine delivered to the defendant, under the terms of the following agreement:—

“Memorandum, Nov. 30, 1850.

“The Company to supply Mr. Southern with brine at 6d per ton of salt. The Company’s and Mr. Southern’s make of salt to be regulated according to the superficial measure of their respective pannage. A minimum price to be fixed for fine and broad salt. The Company to be at liberty to discontinue supplying Mr. Southern with brine, on giving twenty-one days’ notice, and Mr. Southern to be at liberty to cease taking the brine on a similar notice.

(Signed) “For Clay & Newman, J. W. LEA,
“HENRY SOUTHERN.”

It appeared that the plaintiffs were members of a Joint Stock Company, called “The Droitwich Patent Salt Company,” and that the salt had been supplied from their premises; that the Company had been established since the 7 & 8 Vict. c. 110, but was not registered; and that the shares in the Company were transferable without the necessity of obtaining the consent of all the members.

On the part of the defendant, it was thereupon contended, that all the members of the partnership ought to have been joined in the action. The plaintiffs obtained a verdict for 203*l.* 13*s.*, with leave to the defendant to move to set that verdict aside, and to enter a nonsuit.

Alexander now moved accordingly.—The plaintiffs signed

The plaintiffs, who were members of a Joint-Stock Company which dealt in salt, and the defendant entered into a written agreement, to the effect that the Company were to supply the defendant with brine at a certain sum; that the Company’s make of salt and the price were to be fixed according to a certain standard; and that either the Company or the defendant were to be at liberty to cease to supply or to take the salt, upon giving a notice to that effect. This agreement was signed thus: “For Clay & Newman (the plaintiffs) J. W. Lea.” “J. S.” (the defendant.) It appeared that the salt was supplied from the premises of the Company:—*Held*, that the plaintiffs had themselves entered into this contract with the defendant; and that they were entitled to sue him for a breach of it in their own names.

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this contract as the mere agents of the Company; and consequently all the members of it ought to have been joined as plaintiffs in this action. It appears by the terms of the contract itself, that the salt was to be supplied by the Company. The consideration for the agreement passed from the members of that co-partnership.—[*Parke, B.*—We lately had a case in this Court of *Williams v. Marsden (a)*, where a similar point arose; but as we then were clearly of opinion that the parties entered into the contract on their own account, and not as agents, the objection to their right to be made parties to the action was thought to be too clear a matter to allow of any discussion.] In *Lucas v. Beale (b)*, a similar contract, declared upon by the plaintiff alone, was held to be a joint contract with the plaintiff and several other parties; and the Court decided that the plaintiff had been properly nonsuited. So, in the present case, it is clear, from the written agreement and from the evidence, that the members of the co-partnership were the proper persons to sue for a breach of the contract in which they were interested, and which was to all intents made upon their behalf. If there had been any default in the proper supply of salt to the defendant, his remedy would have been against the Company, and not against the present plaintiffs.

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ant might probably have maintained an action against the Company for a breach of contract. But it does not follow that Clay & Newman are therefore precluded from suing upon it. Here the contract is signed by Lea as the agent of the plaintiffs. In the case of *Lucas v. Beale*, the contract was made by the plaintiff as agent of other parties. It may be, that the contract was entered into by the defendant with the plaintiffs for the following reason:—Such a Company as this consists of a fluctuating body of members, which are constantly changing; so that it would become almost impossible to ascertain who the partners were at the time the contract was entered into. For this reason, most probably this form of contract was designedly adopted. I am therefore of opinion that there ought to be no rule.

ALDERSON, B.—I am of the same opinion. Upon the face of this instrument, nobody enters into the contract with the defendant but Clay & Newman. The paper is signed by Lea as their agent. In *Lucas v. Beale*, to which the plaintiff's signature was appended, it was expressly stated to be signed "on behalf of the gentlemen of the orchestra." It was therefore signed *for them*.

MARTIN, B.—I also think that it is highly probable that this contract was entered into by the plaintiffs for the express purpose that they might sue and be sued upon it, and that thereby the difficulty might be avoided of having to join all the members of the Company in an action.

POLLOCK, C. B., had left the Court.

Rule refused.

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April 26.

BURTON v. WHITE and Another.

A testator, by his will (made before the passing of the 7 Will. 4 & 1 Vict. c. 26), devised as follows:—"I give and bequeath to my son J. W. all that farm or estate I bought of Mr. B., of London, containing about twenty acres, situate at the Quinton, in the parish of H., in the county of S., and in the occupation of myself, my son G. W. and W. J."—*Held*, that the son took an estate in fee-simple in the property.

THIS was a special case, directed by a decree of Vice-Chancellor *Knight Bruce*, made in a suit in which William Burton was plaintiff, and John White and Sally Powers were defendants, for the opinion of this Court upon the following devise, contained in the will of Aaron White, dated the 17th day of July, 1820.

The testator, by his said will, which was duly executed as by law was then required for the devise of freehold estates (amongst other things), devised as follows:—"I give and bequeath to my son, John White, all that farm or estate I bought of Mr. Bradley, of London, containing about 20 acres, situate at the Quinton, in the parish of Hales Owen, in the county of Salop, and in the occupation of myself, my son George White, William Read, Benjamin Yates, and William Jones."

The testator, at the date of his will, and at the time of his death, was seised in fee-simple in possession of the property mentioned in the above devise, the fee-simple of which he had purchased of the said Mr. Bradley, and he continued seised thereof to the time of his death (which took place on the 23rd of May, 1822), without having

tion of the property. The words used are not “all *my* estate,” but “all *that* farm or estate.”—[*Parke*, B.—It means all that estate which became mine by purchase. I think you will have some difficulty in distinguishing this case from that of *Gardner v. Harding* (a), where the words of the will were, “I bequeath to my brother my freehold estate, consisting of thirty acres of land, more or less, with the dwelling-house, and all erections on the said farm, situate at S., in the county of M., now in the occupation of J. G.,” and, although the words there were strongly descriptive of the corpus of the property, still they were held to pass an estate in fee-simple. *Martin*, B.—We lately had a similar case in this Court of *Doe d. Pottow v. Fricker* (b), in which a like decision was come to.] The case first referred to may be distinguishable, on the ground that the word “my” is there used instead of “that.” If the words here had been “all that estate” I bought of Mr. B., it may be conceded they would have passed the fee: *Bailis v. Gale* (c). But the word estate is clearly used as synonymous with “farm,” which is not intended to describe the interest of the testator, but merely the locality of the property. [*Parke*, B., referred to *Roe d. Child v. Wright* (d).] In *Doe d. Clarke v. Clarke* (e), the word “property” was held not to have such an effect. *Doe d. Norris v. Tucker* (f) is in the plaintiff’s favour, and *Doe d. Lean v. Lean* (g) very strongly so. And in *Doe d. Burton v. White* (h) it was held that the word “estate” did not necessarily pass the fee.

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Karslake appeared for the defendant White, and *Hayes* for the other defendant, but they were not called upon by the Court.

(a) 3 Moore, 565.

(b) 6 Exch. 510.

(c) 2 Ves. sen. 48.

(d) 7 East, 259.

(e) 1 Cr. & M. 39.

(f) 3 B. & Ad. 473.

(g) 1 Q. B. 229.

(h) 1 Exch. 526.


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POLLOCK, C. B.—I am clearly of opinion that John White took an interest in fee-simple in the property mentioned in this clause of the will. It is not necessary to give an elaborate judgment. Although this will was made before the passing of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, I am not by any means disposed for that reason to put a different construction upon the words here used. The word "estate" has so far a technical meaning as to pass the fee, and the Court will give it that effect if they are of opinion that such was the testator's intention. And I am clearly of opinion that the word "estate" was so used here by the testator. I agree with an observation which fell from my Brother *Martin* in the course of the argument, that although it may be difficult to reconcile all the cases upon this point, there is no necessity to do so here. I am glad that I am not unable to give an opinion which is agreeable to the intention of the testator. I therefore think that we ought to certify to the Vice-Chancellor that the party in question took the fee-simple.

PARKE, B.—I am of the same opinion. It is very desirable that effect, if possible, should be given to every word which a testator has used. Now the word "estate" is sufficient to pass the whole interest a testator has in the subject-matter, unless it be controlled by other words in



there being no other words which restrained them, so as to require the term "estate" to be construed as descriptive of locality only. The mere position of the words, without anything else, makes no difference. I do not think it possible to distinguish this case from those where the word "my" is to be found. The language here is equivalent to that. The Courts are not in the habit of neglecting, if possible, to give full effect to any word used, and I am clearly of opinion that the testator here intended to pass his whole interest in this land.

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PLATT, B., concurred.

MARTIN, B.—I am also of the same opinion. I think it is not necessary to refer to the cases upon this subject, as it is perfectly clear that the testator intended to give all his interest in this property to John White. Therefore the fee passes under this will.

Certificate accordingly.

NORMAN v. MARCHANT.

May 7.

THIS was a rule calling on the defendant to shew cause why the plaintiff should not recover his costs in this action, pursuant to the 13 & 14 Vict. c. 61, s. 13, although the sum recovered was below 20*l*.—It appeared upon the affidavits, that the action was brought to recover the sum of 6*l*. 6*s*., the price of 3000 bricks, which had been supplied by the plaintiff to the defendant. The cause was

The plaintiff and defendant, who dwelt less than twenty miles apart, entered into a written agreement, by which the former engaged to supply the latter with goods of a certain quality

and at a specified price. After the delivery of a portion of the goods, the defendant refused to take the remainder, on the ground that they were not of the quality agreed upon. The plaintiff thereupon sued the defendant in one of the superior Courts, to recover the amount of the goods so delivered; and, at the trial, he gave in evidence the written agreement, and recovered a verdict for the amount of the goods supplied, at the price stated in the agreement. This agreement was executed by both parties, at a place within the jurisdiction of a court within which the defendant dwelt at the time of action brought, and the amount recovered was below 20*l*.:—*Held*, that this was not a case in which the superior Court had concurrent jurisdiction; and therefore, that the plaintiff was not entitled to costs.

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tried before the under-sheriff of Kent, under a writ of trial. The following agreement, signed by the defendant, was given in evidence on the part of the plaintiff:—

“I hereby agree to take 20,000 of the best white bricks of Mr. S. Norman, at 2*l.* 2*s.* per thousand, and to take them away within two months, and to pay on delivery of the bricks.
“G. MARCHANT.”

It was proved that the first 3,000 had been delivered to the defendant at the plaintiff's brick-yard; but that he subsequently refused to take any more, or to pay for those already delivered, on the ground that they were not the best white bricks, in accordance with the contract. The plaintiff obtained a verdict for 6*l.* 6*s.* The undersheriff, upon application made to him for the purpose, refused to certify under the 13 & 14 Vict. c. 61, s. 12. It was further stated in the affidavits, that the plaintiff and defendant dwelt within twenty miles of each other; and that the above-mentioned written agreement was executed by each of the parties signing a counterpart thereof, at a place within the jurisdiction of the Court, within which the defendant dwelt and carried on his business at the time of the action brought.

Consideration showed cause, and contended that upon the



new and implied contract, arising from his conduct with regard to the goods.—He cited *Wood v. Perry* (a).

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PARKE, B.—It appears upon these affidavits that the contract was executed by both parties within the jurisdiction of the court within which the defendant dwelt at the time of action brought. The plaintiff recovered the price agreed upon by the parties in that written contract, and he relied upon that contract; and it is therefore impossible to say that the cause of action did not arise in some material point within the jurisdiction of the court within which the defendant dwelt. This is therefore not a case in which the Superior Court had concurrent jurisdiction, and consequently the plaintiff is not entitled to costs. The rule ought to be discharged.

PLATT, B.—A portion of the goods was delivered, and the action was brought for nonpayment of their value, in *pursuance* of the terms of that contract.

ALDERSON, B., and MARTIN, B., concurred.

Rule discharged.

(a) 3 Exch. 442.

1852.

May 8.

WARD v. BROOMHEAD and Another.

The plaintiff having recovered judgment in an action against two defendants, issued two concurrent writs of ca. sa. thereon, and the defendants were taken in execution, but were discharged by the plaintiff's attorney, upon their making an arrangement for the payment of the debt. The plaintiff afterwards issued a writ of fi. fa. for the balance of the original debt, and the goods of one of the defendants were seized; but, upon payment of a certain sum under protest, the goods were released. A rule

THIS was a rule calling upon the plaintiff to shew cause why satisfaction should not be entered on the judgment-roll in this action, and the signature of the plaintiff to the satisfaction-piece dispensed with.—It appeared by the affidavits, that the plaintiff, having obtained judgment against the defendants in 1844, issued two concurrent writs of ca. sa. against them, under which both defendants were taken in execution, and that they were subsequently discharged by the plaintiff's attorney, on their making arrangements for the payment of a portion of the debt. In October, 1851, the goods of the defendant, J. Broomhead, were seized under a writ of fi. fa. at the suit of the plaintiff, for the balance of the original debt; and 112*l.* having been paid by the defendants under protest, the goods were released. A rule was afterwards obtained, calling on the plaintiff to shew cause why the execution should not be set aside, and the 112*l.* repaid to the defendants, on the ground that the debt was barred by reason of the discharges of the defendants out of custody, in 1844, having taken place by the authority or with the ratification of the plaintiff. On the case coming on for

nesses, &c. The Master reported that the plaintiff, subsequently to the said discharges, had ratified and confirmed the same; whereupon the rule for setting aside the execution, and repaying the 112*l.* to the defendants, was made absolute. The plaintiff thereupon brought an action on the judgment, and having refused to sign the satisfaction-piece when requested by the defendants so to do, the present rule was obtained; against which

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Lush and *Quain* shewed cause.—The defendants are not entitled to enter satisfaction on the roll in this case, where no satisfaction has been in fact given. If the defendants wish to rely upon the fact that they were discharged out of custody by the authority of the plaintiff, they may plead that defence as an answer to the action upon the judgment: *Vigers v. Aldrich* (a). If these defendants were to bring an action of trespass against the present plaintiff, and were to recover damages against him to a less amount than for that of the judgment, the plaintiff would be allowed to enter satisfaction upon the judgment-roll: *Simpson v. Hanley* (b). The matter of fact, whether the discharge of the defendants was effected by the authority of the plaintiff, is a proper question for a jury. The parties are not concluded by the Master's report.—The Court then called upon

Cleasby, in support of the rule.—The matter was referred to the Master, and he has specifically found that the plaintiff did ratify that act. That step was immaterial, if this question is allowed to go before a jury: *Blanchard v. Cawthorne* (c). [*Parke*, B.—I am sufficiently acquainted with the facts of this case to feel assured that the question, whether the plaintiff ever ratified that act, is a very nice

(a) 4 Burr. 2482.

(b) 1 M. & Selw. 696.

(c) 4 Sim. 566.

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one. He is not bound unless that was so, and he is not precluded from trying that question.]

PER CURIAM (a),

Rule discharged.

(a) *Parks, B., Alderson, B., Platt, B., and Martin, B.*

April 30.

THOMAS v. CROSS.

The defendant being indebted to the plaintiff on a bill of exchange for 25*l.*, and being unable to pay the full amount, left 9*l.* 10*s.* in cash, and a bill for 17*l.* in renewal of the balance at the plaintiff's house in discharge of the debt. A few days afterwards he met the plaintiff.

ASSUMPSIT by the plaintiff against the defendant as the acceptor of a bill of exchange for 25*l.* 6*s.* The defendant pleaded, as to 9*l.* 10*s.*, part payment before action brought, and as to the residue, a set-off for money had and received to the defendant's use.

At the trial, before *Platt, B.*, at the Middlesex Sittings in last Term, it appeared that, a day or so before the bill of exchange had become due, the plaintiff had written to the defendant to request him to provide for its payment. The defendant, not being able to raise the whole amount on the day when the bill became due, proceeded to the plaintiff's office with 9*l.* 10*s.* in cash, and a bill for 17*l.*

the plaintiff himself, who then refused to take either the cash or the second bill in payment of the original bill; and upon the defendant's demanding them again, he delivered the bill only to him, and stated that he should keep the cash in part payment for the bill. Upon this the defendant demanded the cash also, which the plaintiff refused to give him; and he added, that he had another claim against the defendant, and that he should apply the 9*l.* 10*s.* to that claim. The defendant, however, deposed that he demanded the return of the money; and that he was not indebted to the plaintiff on any other account; and that he did not assent to the plaintiff's proposal. The meeting ended by the plaintiff turning the defendant out of his office. The plaintiff commenced this action about a week afterwards.

It was contended, on the part of the defendant, that the transaction did not amount to a payment, but that the defendant was entitled to the amount so paid under his plea of set-off(*a*). The learned Judge asked the jury if they believed the defendant; and upon their replying in the affirmative, a verdict was entered for the plaintiff for the sum of 16*l.*, and a verdict for the defendant upon the plea of payment; with leave to the plaintiff to enter the verdict for him upon the plea of payment, the damages to be reduced upon the plea of set-off by the sum found in the defendant's favour on the plea of payment.

In last Term, *J. Brown* moved accordingly, and cited *Rodgers v. Maw* (*b*); and the Court, having taken time to consider, granted a rule nisi.

Bramwell shewed cause, and contended that the conduct of the plaintiff afforded some evidence that he had accept-

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(*a*) In case the amount due, being above 20*l.*, is reduced by a set-off below 20*l.*, the plaintiff is entitled to costs: *Woodhams v. Newman*, 7 C. B. 654.
 (*b*) 15 M. & W. 444.

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ed the payment of the sum in satisfaction of so much of the debt.

J. Brown, in support of the rule.—There was no evidence that the plaintiff received the cash so paid to him by the defendant in satisfaction of that amount due upon the bill. The proof which is required to support a plea of payment appears by reference to the form of that plea, which states that after breach the defendant paid to the plaintiff, and the plaintiff accepted and received of the defendant, a certain sum in satisfaction of that amount. Here the defendant made a proposal to the plaintiff that he should take a sum of money and another bill in satisfaction of the original bill. The plaintiff never accepted that offer. If the circumstances of the case had been the same as they are, with this difference only, that the plaintiff had returned the money and had kept the bill, the defendant might have successfully maintained an action of trover for it. After the return of the second bill and the detention of the cash, no act was done on the part of the defendant which amounted to an assent by him that the plaintiff should treat this as part payment. The plea of payment is no admission of that fact.

POLLOCK, C. B.—I regret that there should exist any



them to say that the payment was made on account of the debt which was due. I therefore think that the rule ought to be discharged.

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PARKE, B.—The point reserved by the learned Judge at the trial was, whether these facts amounted to a payment; and the question is, what opinion are we to form upon the whole evidence in the case? Upon these facts, I entertain no doubt in my mind that the verdict ought to have been found for the plaintiff upon the plea of payment, on the ground that the whole transaction between the parties did not amount to a payment of the sum delivered to the plaintiff, but to a set-off. The transaction was in effect as follows: the defendant carried the sum of 9*l.* 10*s.*, and the bill for 17*l.*, to the plaintiff's office, and left them there, on condition that the plaintiff would accept the money in part discharge of the bill for 25*l.* 6*s.*, then due, and that he would take the bill in renewal of the balance. The plaintiff kept the money, but refused to take the bill; and the condition not being complied with, the defendant had a perfect right to demand the money back again; and in fact he did so; and the plaintiff had no right whatever to retain it, and to call it payment of another account. If the matter had rested there, this would have been no part payment, but a set-off. Therefore the only question is, whether there is any evidence, after this transaction, that the sum of 9*l.* 10*s.* was retained by the plaintiff, by the authority or consent of the defendant, as part payment of the original bill. Now I think that there was no evidence to warrant any such conclusion. It was suggested by my Brother *Martin* in the course of the argument, that it might be treated as payment, as the defendant had pleaded payment of that amount; but that is not so, for the plea of payment is not to be taken as evidence of that fact, as was explained in the case of *Boileau v. Rutlin* (a), where the effect of plead-

(a) 2 Exch. 665.

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ings as admissions of facts was much considered. The plea of payment cannot be taken as an admission by the defendant that he has made any payment whatever; neither does the fact of the defendant pleading that plea amount to a ratification by him of the appropriation by the plaintiff of the sum of 9*l*. 10*s*. The circumstance that there is a plea of set-off might equally be taken to shew that the defendant intended to treat the transaction as well that as the other. But I think this makes no difference. Then what evidence was there, after the receipt of the money, to shew any election on the part of the defendant that the plaintiff should retain the money free of the original condition upon which it had been left with him? Nothing occurred after the meeting took place, with the exception that this action was commenced, to which the defendant has pleaded payment. The plaintiff, therefore, had no right to claim the money as payment, and the defendant might have recovered it back in an action of money had and received. In order to make it a payment, both parties must concur. I think it very clear that this was not a payment, but a set-off only.

PLATT, B.—I must own that I think the rule ought to be discharged, on the ground that this was a payment; or if it was not strictly a payment in point of law, that there was



plaintiff's office again, and, upon finding how matters stand, he says, "Give me back my money and my bill." To which the plaintiff says, "You may have your bill, but I shall keep the money." Now, I think that it did not lie in the plaintiff's power to repudiate the transaction in that manner. He received the money as part payment; and he could not, by his own act, alter the character in which the money had found its way into his hands. Moreover, the plaintiff himself says that he retained it as payment, but of another debt, which the jury have found not to be due. They were therefore, I think, justified in finding that this was a payment as intended by the defendant.

MARTIN, B.—I am sorry that we should differ upon this matter, but I am inclined to agree with my Brother *Parke*. I take the law to be this: If a man is liable to pay money at a certain fixed time, and he brings the money at that time to the creditor, that is a payment in performance of the contract. But if the money be not paid at that time, it becomes a debt payable on request, and there must be the assent of both parties to the proposition which is intended as payment. This, as Mr. *Brown* justly observed, is the true explanation of the plea of payment: the one party must agree to pay the money and the other to accept it as payment. In this particular case the bill was due, and a debt payable on request had arisen; and that debt could not be got rid of, or any part of it, by payment, except by reason of the defendant's paying, and of the plaintiff's accepting, the sum paid in satisfaction of the whole or the part of the amount. I think that there was no evidence of any such concurrence of the parties here. The result of this case is that the plaintiff's application fails, for which I am not sorry, as I think the justice of the case is the other way.

Rule dropped.

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The defendants received from the plaintiff at Panama certain goods to be delivered in London, "the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers, of what

DE ROTHSCHILD and Others v. THE ROYAL MAIL STEAM PACKET COMPANY.

CASE.—The declaration stated, that, on &c., the plaintiffs caused to be delivered to the defendants for shipment on board one of their ships, in parts beyond the seas, to wit, off Chagres, in South America, divers, to wit, eleven boxes of gold dust, of great value &c., to be carried and conveyed by the defendants (with liberty to trans-ship on board any of their ships) to, and delivered within a reasonable time in that behalf at, the Bank of England, in the City of London (the act of God, the Queen's enemies, pirates, robbers, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers, of what-

for the defendants to carry and convey the goods to, and deliver the same at, the place and in manner aforesaid, had elapsed before this suit; and they were not prevented from doing so by the act of God, the Queen's enemies, pirates, robbers, accidents from machinery, boilers, or steam, the dangers of the seas, roads, and rivers, or any or either of the risks so excepted as aforesaid.—Breach, that, although the defendants have carried, conveyed, and delivered a part of the goods, to wit, ten boxes of gold dust, yet they have not carried, conveyed, and delivered the residue of the goods, to wit, the other of the said boxes of gold dust, being of great value, &c. to the plaintiffs or their assigns, at the place and in manner aforesaid, or in any manner whatsoever; and the same has not been in any manner delivered to the plaintiffs: and that, whilst the defendants had the last-mentioned box of gold dust for the purpose aforesaid, they took so little and such bad care thereof, that the same then, by reason of the bad and improper care and conduct of the defendants in that behalf, and not by reason of any or either of the said excepted risks, became and was wholly lost to the plaintiffs.

Pleas: first, not guilty; secondly, that the defendants were prevented by robbers from carrying and delivering the residue of the goods, to wit, the other of the boxes of gold dust to the plaintiffs or their assigns, or to or at the Bank of England: concluding to the country. Thirdly, that the defendants were prevented by the dangers of the roads from carrying and delivering the residue of the goods, &c.: concluding to the country. Upon which issues were joined.

At the trial, before *Pollock*, C. B., at the London Sittings after last Michaelmas Term, it appeared that, on the 1st of April, 1851, the plaintiffs' agent at Panama delivered to the defendants' agent eleven boxes of gold dust for shipment to this country, and took from him the following bill of lading:

“Received in good order and well-conditioned, from B. Davidson, Esq., for shipment on board one of the Royal Mail


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Steam Packet Company's vessels off Chagres, 11 packages, weighing gross five hundred weight, one quarter, thirteen pounds, fourteen ounces, and said to contain seven thousand, three hundred, and seventy seven ounces, ten dwts T. W. gold dust, valued one hundred and eighteen thousand and forty dollars, being marked and numbered as per margin, and are to be delivered, with liberty to trans-ship on board any other of the Company's ships, in like good order and condition, at the Bank of England (the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers, of whatever nature or kind soever excepted), unto Messrs. N. M. Rothschild & Sons, of London, or his or their assigns, he or they paying freight at the rate of one and three-eighths per cent.—In Witness &c.

WILLIAM PERRY,
Agent appointed by the Royal Mail Steam
Packet Company."

All the boxes were carried by the defendants across the Isthmus of Panama to Chagres, and there shipped on board one of their steam vessels for Southampton, where they arrived on the 7th of May. On the following day the boxes were unloaded, and placed in trucks belonging to the South Western Railway Company, for the purpose of being carried to London. The tops of these trucks were covered with tarpaulins, fastened on the outside, but so loosely as to admit of a person creeping into the truck. In the course of the transitus from Southampton to London,



The *Attorney-General*, *Crowder*, and *Needham* shewed cause.—This bill of lading differs from the ordinary form, inasmuch as it contains exceptions with respect to “robbers” and “dangers of the roads.” *Smith’s Mercantile Law*, p. 275; and it is submitted that the defendants are protected by one or other of those exceptions. First, as to the meaning of the word “robbers.” That word is not found in any mercantile instrument; the term “pirates” being used in policies of insurance. It was, no doubt, introduced to guard against the risk to which the defendants were exposed as carriers by land over the dangerous district of the Isthmus of Panama. Is, then, the strict technical meaning to be applied to the term, or is it to receive its popular acceptation, which was more likely to have been in the contemplation of the parties? In *Tomline’s Law Dictionary*, “Robbery” is defined as “a felonious taking away of money or goods of any value from the person of another, or in his presence, against his will, by violence or by putting him in fear, and of purpose to steal the same.” In *Black. Comm.*, Vol. 4, p. 242, it is said, “Larceny from the person is either by privately stealing, or by open and violent assault, which is usually termed *robbery*.” It is clear that the parties could not have used the term in either of those senses, for the packages were not to be conveyed in the personal presence of the defendants or their servants, much less upon their persons. *Johnson*, in his *Dictionary*, defines “Robbery” as “theft perpetrated by force or with privacy.” A similar definition is given in *Barclay’s Dict. (b)*. The legislature has frequently used

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that assuming simple theft to be within the exceptions, a theft occasioned by the negligence of the defendants was not protected, inasmuch as they could not be said to have been *prevented* from carrying by such theft. See as to piracy occasioned by negligence, *Abbott on Shipping*, 386; as to

loss by perils of the seas, that might have been avoided by proper care, *Angell on Carriers*, 166; as to loss by the Act of God, superinduced by negligence, *Siordet v. Hall*, 4 Bing. 607; and as to the form of pleading, *Latham v. Rutley*, 2 B. & C. 20.

(b) Edit. 1798. See Webster’s

ruled. An Act that no person robs
 day time, although no person be there
 to have the benefit of his clergy," in
 clause, the words "felonious taking
 2, c. 15, s. 1, enacts, that no owner of
 for "any loss or damage by reason of
 secreting, or making away with, by the
 or any of them, of any gold, silver," &
 value of the ship. The language of
 cludes all idea of force; and yet it
 where a robbery took place by connivance
 mariners, the master was within the
 tute: *Sutton v. Mitchell* (a). The 26th
 tends that protection to the case "of
 zlement, secreting, or making away with
 evidently intending by the term rob
 all kinds of theft. In *Tomlinson v. E*
 was an action for slander, the defenda
 "He robbed John White;" and *Little*
 not think the term 'to rob' necessary
 goods from another by force, in the sen.
 (7 & 8 Geo. 4, c. 29, s. 6). The word is
 in the sense of theft (d). Such being the
 pular acceptation of the term, that was
 adopted in construing this instrument

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840.

that the circumstances under which the boxes were stolen were sufficient to render this a robbery within the strict legal sense of the term. On that point they cited Arch. Crim. Plead. 275, *Rex v. Moore* (a), *Rex v. Mason* (b).]

Secondly, the loss is within the exception of "dangers of the roads." The term "roads" does not mean "roadsteads," but land-roads; and the words "dangers of the roads" are not limited to perils arising from the roads themselves, such as rough or precipitous places, but are equivalent to "dangerous roads," from whatever cause such danger may arise. In Doctor & Student, Dial. 2, c. 38, it is said, "that it is commonly holden by the laws of England, if a common carrier go by the *ways that be dangerous for robbing*, &c., he shall stand charged for this misdemeanor." "Piracy" is within the term "dangers of the seas:" *Pickering v. Barkley* (c), *Barton v. Wolliford* (d). In like manner "dangers of the roads" will comprehend a loss by theft of any description.

Sir A. Cockburn (*Bramwell* and *Willes* with him), in support of the rule.—First, this was not a loss within the exception as to robbers. It is conceded that the definition of robbery, as found in Dictionaries and in the best text-writers, does not always include violence; and even in some of the earlier statutes the term is used as implying theft without force; but all the authorities agree in the distinction between robbery and theft; and unless there is some reason to the contrary, the Court is bound to construe the term according to its ordinary legal, and not its popular, signification. It is reasonable to assume, that the parties, when they executed an instrument which was to have a legal operation, used a term of art which conveyed the technical meaning they intended to express. The context and the surrounding

(a) 1 Leach, C. C. 335.

(c) 2 Roll. Abr. 248; Sty. 132.

(b) Russ. & R. 419.

(d) Comb. 56.

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circumstances are sufficient to induce the Court to adopt that construction which is in accordance with the legal acceptation of the term. The defendants are carriers by land as well as by water. On the other side of the Atlantic the country is wild and barbarous; and, in crossing the Isthmus of Panama, the persons conveying the treasure would be exposed to the attacks of armed bands of robbers. To guard against such risk, arising from a vis major, this exception was inserted; not to protect the defendants from any pilfering which might happen in a peaceable country like this, more especially when it was in consequence of their own culpable negligence. The exception in this bill of lading is taken from policies of insurance, which usually contain the words "pirates, rovers, thieves;" which mean "public thieves, as enemies, pirates, &c.:" Com. Dig. tit. "Merchant" (E. 9). That distinction between theft accompanied by violence (latrocinium), and simple theft (furtum), is pointed out in Arnould on Insurance, p. 817, and Abbott on Shipping, p. 345, 8th edit.; and the same distinction applies in the case of bailments: Jones on Bailments, p. 43.

Secondly, this was not a loss by "dangers of the roads." It is by no means clear that the term "roads" was not intended to apply to the roads in which the ship lay, when the goods were put on board. But at all events, there is no

May, the Court then said that it was unnecessary to hear any further argument on the part of the plaintiffs.

Cur. adv. vult.

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The judgment of the Court was now delivered by

PARKE, B.—In this case the plaintiffs sought to recover from the defendants the value of two boxes of gold dust, part of eleven received by them at Panama, to be carried to the Bank of England. The defendants carried goods from Panama across the Isthmus by land, shipped them at Chagres, and brought them by steam vessels to Southampton, and thence carried them by the London and South Western Railroad to London. A bill of lading was given by them at Panama, acknowledging the receipt of eleven packages, said to contain 7000 and odd ounces of gold dust, to be carried to the Bank of England: “the act of God, the Queen’s enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, dangers of the seas, roads, and rivers, of whatever nature or kind, excepted.” All the packages arrived safe at Southampton, and were placed on the railroad to be carried to London; but two of them were stolen secretly from a railroad truck, before their arrival there; and the jury found that the defendants were guilty of negligence in the conveyance to London, which caused the loss.


The defendants pleaded the exceptions in the bill of lading in two different pleas: one stating that the loss was occasioned by robbers; the other, by dangers of the roads.

At the trial, before the Lord Chief Baron, both pleas were found for the defendants, but with a reservation of liberty to enter a verdict on both for the plaintiffs. A rule nisi having been granted, the case, on behalf of the defendants, was elaborately and fully argued during the last Term. Sir *A. Cockburn* was heard in part for the plaintiffs; and,

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being satisfied that the plaintiffs are entitled to recover, we do not think it necessary to hear any further argument. The question is, whether the theft committed on the London and South Western Railroad was, first, an act of "robbers," or secondly, a danger of "roads," within the true meaning of the bill of lading. We think it was neither.

It was argued for the defendants, that the word "robbers" ought not to be construed in the technical sense given to the word "rob" by the English law writers, and by some of the English statutes, (1 Vict. c. 87, s. 2, for instance) where it means the felonious taking from the person or in the presence of another, of money or goods, against his will, by force, as putting him in fear, for it was not likely that robbery in that sense would occur, as the packages would not usually be in the personal presence of the defendants or their servants, still less on their persons; and other statutes were cited, where its meaning is much more comprehensive, and includes a taking without force; and besides, in construing such instruments, it was contended that the ordinary meaning of the words used must be followed. We think that position is correct, but we must also look at the circumstances under which the contract was made, and the peculiar subject to which it applied; and taking these into consideration, we cannot doubt that the meaning of the contract was, that the defendants were not to



care; but it is likely that they should agree to exempt them, where the goods were taken by a force which they could not resist. The nature of the transaction shews clearly, therefore, that the word "robbers" means, not "thieves," but robbers by force, to whom the term is more reasonably applied, though in common parlance it is often applied to every description of theft. We have no doubt, therefore, that in this bill of lading this is the proper meaning of the word "robbers;" and this being so, the loss in this case was not by robbers: and that plea, in which the loss is so stated, ought to be found for the plaintiffs.

We do not feel any difficulty as to the meaning of the term "dangers of roads." We think the word "roads" either explained by the context to mean marine roads, in which vessels lie at anchor; or supposing it to mean roads on land, the dangers of roads are those which are immediately caused by roads, as the overturning of carriages in rough and precipitous places; losses by robbery are already provided for under the general term robbers; and the same reason which induces us to believe that the parties did not mean that the defendants should be exempted from pilfering by thieves, when loss by robbers is exempted, leads us to the conclusion that they did not intend that they should be protected in the case of loss by thieves in passing along roads. The rule will therefore be absolute.

Rule absolute.

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June 7. BENHAM v. THE UNITED GUARANTIE AND LIFE ASSURANCE COMPANY.

The defendants granted to the plaintiff, the treasurer of a literary institution, a policy of guarantie against loss occasioned by the want of integrity of W., the secretary of the institution. The policy recited, that, as the basis of the contract for such guarantie, the plaintiff had lodged at the office of the defendants a certain statement in writing, containing a declaration, signed by the plaintiff, of the truth of the answers thereby given to the questions therein contained. This statement contained

COVENANT.—The declaration stated, that, by a certain instrument or policy of guarantie, sealed with the common corporate seal of the defendants (profert); after reciting that the Marylebone Literary and Scientific Institution had agreed to take into their service and to employ as secretary one Robert Weir in the policy of guarantie described, upon the condition of his procuring a sufficient surety to guarantee the plaintiff, therein described as and then being the treasurer of the said institution, to the extent of 200*l.*, against loss occasioned by the want of integrity, honesty, or fidelity, of the said R. Weir in such service or employment; and that, in performance of the said condition, the said R. Weir, with the concurrence of the plaintiff as such treasurer, had agreed with the defendants for the grant by them to the plaintiff of that policy of guarantie; and that, as the basis of the contract for such guarantie, the plaintiff had lodged at the office of the defendants a certain statement or document in writing, in the policy of guarantie described as "Employers' Guarantie Proposal, No. 624," containing (among other things) a declaration signed

R. Weir had paid to the defendants, or their duly authorised agent or officer, the sum of 2*l.* 10*s.* as the premium or consideration for such guarantie as thereafter expressed, for the space of one year, commencing on the 13th of May, 1850, and terminating on the 13th of May, 1851, both inclusive: it was witnessed, that the defendants, fully relying on the truth of the declaration contained in the said statement or document, did thereby agree and declare that, during the space of one year, commencing and terminating as aforesaid, and afterwards during every succeeding year in respect of which the defendants should consent to receive, and R. Weir and the plaintiff, or one of them, should, before or upon the 13th of May in the same year, pay or cause to be paid unto the defendants, or unto such officer or agent as should be duly authorised by the directors of the Company to receive the same, the annual premium or sum of 2*l.* 10*s.*, the general funds and property for the time being, and the subscribed capital of the Company, but none of the members or officers thereof individually or personally, should, to the extent or amount in the whole of 200*l.*, but to no further or greater extent or amount, be subject and liable, according to the deed of settlement and rules of the Company, to satisfy, reimburse, and make good unto the plaintiff or other the treasurer for the time being of the said institution, or the representatives or assigns of the said institution, within three calendar months next after proof should be given, to the reasonable satisfaction of the directors of the Company, of the occurrence of such next-mentioned loss, every loss whatsoever which during the continuance of the liability of the Company under the said policy should be sustained by the treasurer of the said institution, by reason or in consequence of the want of integrity, honesty, or fidelity of the said R. Weir, in or arising out of his employment to be such secretary of the said institution. And it was by the policy of

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guarantie provided, that, (so far as the next-mentioned rules and regulations were capable of application to the same), the said policy and the guarantee thereby granted or undertaken should be subject and liable to the rules of the said Company referred to by the notice of even date therewith, thereupon indorsed, and to all other the then existing rules and regulations of the Company relative to policies of guarantee and guarantees granted or undertaken thereby, and that in the same manner as if all the said rules and regulations were actually incorporated at length in the policy with especial reference thereto. The declaration set out the notice as follows:—"Take notice, that by the rules which in the first schedule to the deed of settlement of this Company are numbered 130, 131, 132, 134, 135, and 136, (and to which you are referred for more particular information), it is provided to the effect: That any fraudulent mis-statement or suppression in any declaration, in consequence of and with express reference to which a policy of guarantee is granted by the Company, renders such policy void from the beginning." [Then followed other rules not material to the present question.]—Averment, that the statement or document referred to in the policy of guarantee, and therein described as "Employers' Guarantee Proposal, No. 624," contained certain questions and answers, that is to say, first, "Is the applicant at present

nature of his intended duties and responsibilities?" The answer to which was—(A), "Mr. Weir is secretary of the Marylebone Literary Institution, of which I am the treasurer." Another of which questions was—(C) "*The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed?*" The answer to which was—(C) "*Examined by finance committee every fortnight.*" Another of which questions was—(D) "The salary or emolument which will be paid to him, and how and when it will be paid?" The answer to which was—(D) "80*l.* a-year at present." And another of which questions was—Fourthly, "Shall you require any further pecuniary guarantie for the applicant's integrity than that proposed to be obtained from this Company to the extent of —*l.*? and, if so, what is the nature and amount of the further guarantie you require?" The answer to which was, "No." And another of which questions was—Fifthly, "Are you aware of any reason why a guarantie of the applicant's integrity should be considered as more than usually hazardous?" The answer to which was, "No."—The declaration then averred, that no answers except as aforesaid were given to the questions contained in the statement or document in writing in the policy described as "Employers' Guarantie Proposal," &c.; and that the said answers and the declaration concerning the same were true; that R. Weir, to wit, on the said 13th May, 1850, became and was the secretary to the said institution, and so remained and continued from the time of the sealing of the policy of guarantie until the 18th of July, 1851; and the said institution during all that time retained and employed him in their service in the capacity aforesaid; that the plaintiff during all that time remained and continued and still is the treasurer for the time being of the institution; that during the continuance of the liability of the defendants under the said policy of

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guarantie, to wit, on the 13th of May, 1851, the defendants consented to and did then receive from the said R. Weir, and R. Weir then paid to them, a certain other annual premium or sum of 2*l.* 10*s.*, as and by way of premium or consideration for continuing such policy of guarantee for one year, commencing the said last-mentioned day and terminating on the 13th of May, 1852, both inclusive; and thereupon, and according to the terms of the policy of guarantee, and under and by virtue of the same and the last-mentioned receipt and payment, the general funds and property for the time being and the subscribed capital of the Company, during the last-mentioned space of one year, commencing and terminating as aforesaid, were to the extent or amount of 200*l.* liable, according to the deed of settlement and rules of the Company, and, subject to the rules and regulations, clauses, provisoes, stipulations, and conditions contained in the policy of guarantee, to satisfy, reimburse, and make good unto the plaintiff, or other the treasurer for the time being of the institution, within three calendar months next after proof should be given, to the reasonable satisfaction of the directors of the Company, of the occurrence of the next-mentioned loss, every loss whatsoever, which, during the continuance of the liability of the defendants under the policy during the last-mentioned period, should be sustained by the treasurer of the insti-

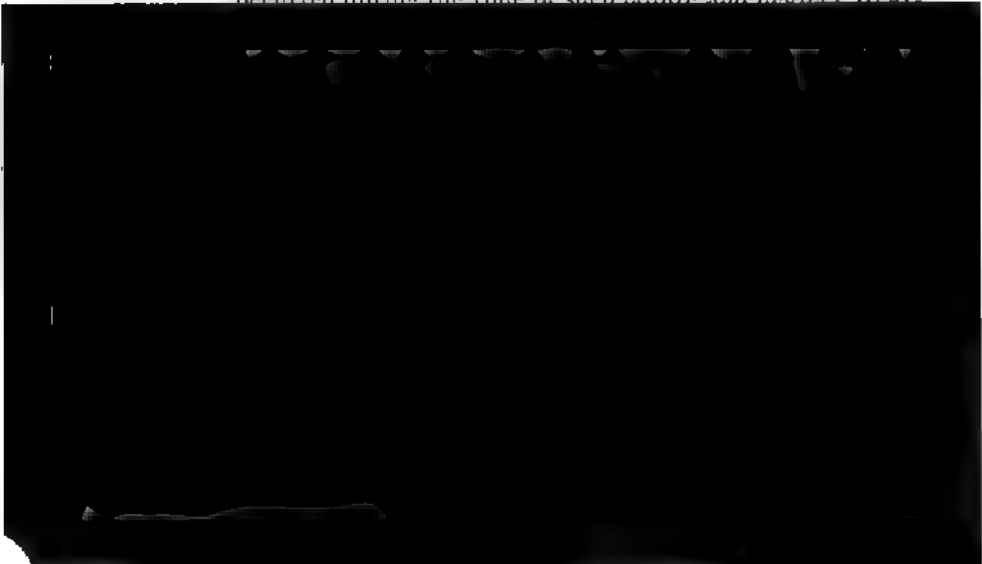
14th of May, 1850, and on divers other days &c., R. Weir, in the capacity of and in the course of his employment and duties as such secretary, was intrusted with and held for the benefit and on account of the institution divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of 188*l.* 11*s.* 1*d.*; and the same then, by reason and in consequence of the want of integrity of R. Weir in his employment as such secretary, to wit, by his embezzlement thereof, became and was wholly lost, to wit, to the institution and the plaintiff as such treasurer; and the plaintiff and the institution then, and not before, discovered and had notice of the same.—The declaration then averred, that the plaintiff gave proof, to the reasonable satisfaction of the directors, of the loss; and that three calendar months after proof had elapsed before the commencement of the suit.—Breach, that the defendants did not make good the loss, although the funds of the Company were sufficient for that purpose.

Plea, as to 100*l.*, parcel &c., payment of that amount into Court; and as to the residue of the 188*l.* 11*s.* 1*d.*: That the statement or document in writing, in the policy of guarantie in the declaration in this action mentioned and described as “Employers’ Guarantie Proposal, No. 624,” lodged by the plaintiff, and the declaration in the statement or document signed by the plaintiff as in the declaration in this action mentioned, were respectively lodged and signed, and all the several questions and answers in the statement and document in the declaration in this action mentioned were respectively proposed to and returned by the plaintiff, the treasurer of the institution in the declaration mentioned, by and with the authority of the said institution, to form, and did form, the basis of the contract for such guarantie as in the declaration in this action mentioned; that whilst R. Weir remained and continued such secretary, and before the loss of the residue of the sum of 188*l.* 11*s.* 1*d.*, and before the want of fidelity, &c. of R. Weir

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in respect of that residue, and before his embezzlement thereof, to wit, on the 14th of May, 1850, and thence continually until and after the loss of the whole of the said residue, &c., and the want of integrity, &c. of R. Weir in respect thereof, and his embezzlement thereof, divers, to wit, twenty-six of the fortnights for the examination by a finance committee of the accounts of R. Weir in the answers to the third question in the declaration in this action mentioned had elapsed, and the plaintiff and the institution in the declaration mentioned wholly failed and neglected during the whole of the time last aforesaid to use the said checks to secure accuracy in his accounts, by any fortnightly or any other examination thereof by any finance committee; and wholly failed and neglected to hold or institute, or cause to be held or instituted, any such examination stipulated for as part of the basis of the contract of guarantie in the policy of guarantie and the statement or document described as "Employers' Guarantie Proposal, No. 624," and the questions and answers therein and in the said declaration in this action mentioned, and during all the time last aforesaid no such examination was ever had or held: that the loss of the whole of the said residue of the sum of 188*l.* 11*s.* 1*d.*, and the want of integrity, &c. of R. Weir in respect thereof, and his embezzlement thereof, occurred during the time of such failure and neglect to ex-



counts of R. Weir was not a condition precedent to the defendants' liability. In policies of insurance, there is a well-known distinction between a representation and a warranty. The answer here given as to the checks merely referred to the intention of the plaintiff at that time. If the examination of the accounts be treated as a warranty, the omission to examine them for a day or even an hour after the time specified would avoid the policy. [*Pollock*, C. B., referred to *Shaw v. Robberds* (a); *Martin*, B., referred to *Barrett v. Jermy* (b).]

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The Court then called on

Lush to support the plea.—The answer, that the accounts would be examined every fortnight, formed part of the basis of the contract between the parties; and consequently, the statement was not a mere representation but a warranty. In policies of insurance, the distinction between a representation and a warranty is this, that, whatever materially affects the risk or premium, even though inserted in the margin of the instrument, is to be construed as a warranty. In *De Hahn v. Hartley* (c), Lord Mansfield, C. J., says:—"A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it is literally complied with. Now, in the present case, the condition was, the sailing of the ship with a certain number of men; which not being complied with, the policy is void." Here, the risk was materially affected by the neglect to use proposed means for securing the fidelity of the party. The contract was entered into upon the faith of the credit given to the answers. Some of these relate to past, some

(a) 6 A. & E. 75.

(b) 3 Exch. 535.

(c) 1 T. R. 343.

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to present, and some to future facts. One of the latter, namely, the amount of salary, is not a warranty, since the answer is qualified. But the answer to the question as to the capacity in which the party was to be employed is a warranty; for, if a person becomes surety for another in the situation of a porter, and he is afterwards employed as a clerk, the guarantie is at an end. [*Martin, B.*—The question here is, in what capacity do you *intend* to employ the applicant?] The question and answer as to what “checks will be used to secure accuracy in the accounts” are in an absolute form. [*Pollock, C. B.*—Suppose that, instead of examining the accounts every fortnight, the institution had adopted, as a more convenient mode of securing the fidelity of their secretary, the practice of sending the money every day to a banker, and that on one occasion, when some was left, the secretary absconded with it, would the policy be avoided? If this is a warranty, it must be construed strictly; and therefore, although the institution had found out a better mode of checking the accounts, they would, nevertheless, be obliged to go through the idle ceremony of having them examined by a finance committee.] The plea expressly avers that the loss was in consequence of the neglect to examine the accounts. The cases which have been referred to are distinguishable from the present; for in neither of them was it

intended to be pursued; and if that answer was made bona fide and honestly, it does not prevent the plaintiff from maintaining this action.

ALDERSON, B., and PLATT, B., concurred.

MARTIN, B.—I entertain no doubt about it. The application for guarantie is made by the secretary of the institution; but the questions are not asked of the person who proposes to contract, but of his employer; and this answer is no condition precedent, but a mere representation. The distinction between a representation and a warranty is pointed out in *Wms. Saund.* in a note to the case of *Goram v. Sweeting (a)*.

Judgment for the plaintiff.

(a) Vol. 2, p. 200 c.

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June 2.

ASSUMPSIT on a bill of exchange, drawn by J. Plews upon, and accepted by, the defendant, and by J. Plews indorsed to the plaintiff.

Plea, puis darrein continuance, that, more than six calendar months next previous to the presentation and filing of the petition of the defendant to the Court of Bankruptcy as hereinafter mentioned, and thence continually to such presentation, &c., the defendant was a trader, dealer, and chapman, to wit, a pianoforte key hammer maker, within and subject to the powers and provisions of "The Bankrupt Law Consolidation Act, 1849;" and, during all that time, the defendant resided and car-

A plea of a certificate granted by a Commissioner in bankruptcy to a petitioning trader, under the 221st section of the 12 & 13 Vict. c. 106, is bad, unless it avers "that the resolution or agreement has been carried into effect, and the creditors of the trader have been satisfied."

Seem, also, that such certificate is binding

on those persons only who are creditors at the time of the petition, and have had notice of the sittings of the Court, as required by the Act; and therefore, where a petitioning trader, being the acceptor of a bill of exchange, gave the requisite notice to the drawer of the bill, whom he supposed to be the holder, the certificate was invalid against an indorsee without notice, who was in truth the holder, notwithstanding the trader had no means of ascertaining that fact.

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ried on his business as such trader within the London district of the Court of Bankruptcy; and as such trader, the defendant then became and was indebted to divers persons for true and just debts, who then became and were creditors of the defendant, and so remained and continued up to the time of the presentation to the Court of Bankruptcy, by the defendant, of the said petition, and the filing thereof; and thereupon, and whilst the defendant was such trader, and whilst he was so indebted, and after the accepting of the bill of exchange as in the declaration mentioned, and the accruing of the causes of action in respect thereof, and after the coming into operation of "The Bankrupt Law Consolidation Act, 1849," and whilst the bill was outstanding, and whilst the defendant was liable thereon to the holder thereof, to wit, on &c., the defendant became and was unable to meet his engagements with his creditors, and did thereupon then duly, and according to the powers and provisions of "The Bankrupt Law Consolidation Act, 1849," and in manner and form as therein directed, present a petition in writing to her Majesty's Court of Bankruptcy in London, being the Court within whose jurisdiction the defendant had so previously resided and carried on his business as a trader for six calendar months previously to his presenting such petition and the filing thereof; and the petition was and is in the form contained

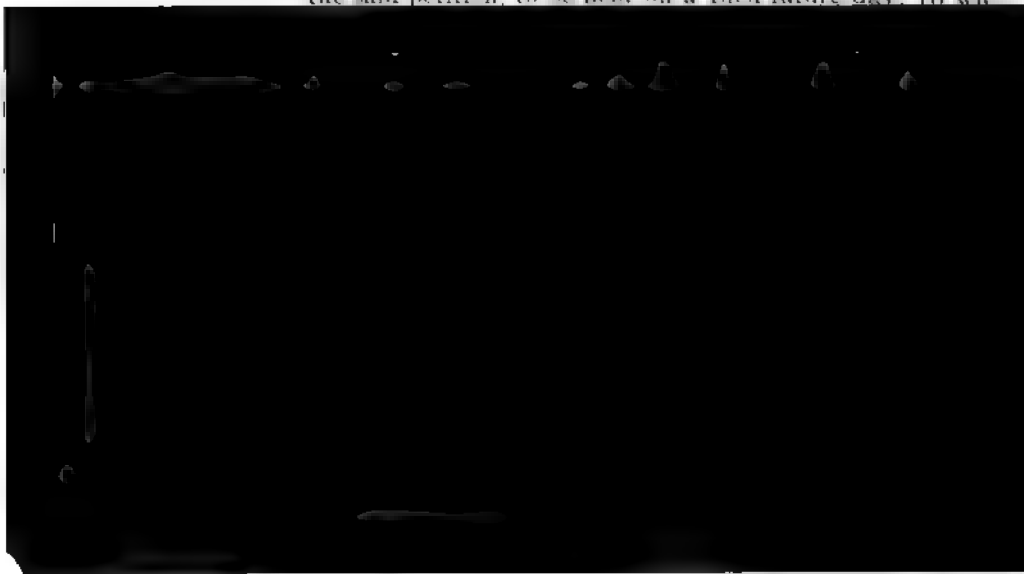
appointed an official assignee.]—That the Court of Bankruptcy did, after granting such protection, to wit, on &c., duly and according to its course of practice in that behalf, and the powers and directions of the said Act, appoint a private sitting to be held in the matter of the said petition, at a certain then future day and place, to wit, on &c. That, fourteen days before the said private sitting was held, notice of the same was given in writing to every person whom the defendant then knew to be then a creditor of the defendant, or whom he had any means of knowing was then such creditor; and, amongst others, to J. Plews, so then being the drawer of the bill in the declaration mentioned: such notices being given in manner and form as required by the statute, to wit, by each of the notices being then sent by post, addressed to each of such creditors at his last known place of business. That the defendant did not, at the time when such notices, or any of them, were given and sent, know, nor did the Court of Bankruptcy or the official assignee know, that J. Plews had indorsed the bill to any other person whatever, or that J. Plews was not then the holder thereof, or who was then the actual holder of the bill or entitled to the proceeds thereof other than and except J. Plews, or the address, description, or locality of such holder. That the defendant did, ten days before the day appointed for the said private sitting of the Court, to wit, on &c., duly, and according to the form, rules, and course of practice of the Court of Bankruptcy, file in Court a full account of his debts and of the consideration thereof, and the names, residences, and occupations of his then creditors, and, amongst others, a full account of the debt and cause of action in the declaration mentioned; that is to say, by stating in such account, that J. Plews, of &c., was a creditor for 37*l.* for goods, and had a bill due the 6th of August, 1851, for the said sum; and also a full account of his the defendant's estate and effects, &c.; and did also therein set forth such proposal as he was then able to make

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for the future payment or compromise of such debts or engagements, to wit, a proposal, to the effect that the defendant would pay his creditors a composition of seven shillings and sixpence in the pound on their respective debts, payable in equal portions of two shillings and sixpence each, at three, six, and nine months, from the 1st of August, 1851; and the defendant did, at the same time when he did so file such account, furnish the official assignee with a copy of such account; and at the private sitting of the Court so appointed, to wit, on &c., and after the said bill became due and payable, and before the commencement of this suit, divers, to wit, ten creditors of the defendant, to the amount of 10*l.* and upwards, did then prove their debts, according to the powers, provisoes, and directions of the said Act; and the defendant did also then and there attend and make oath of the truth of the account so filed by him, and did then and there submit to and was ready and willing to be examined thereon. That three fifths in number and value, to wit, the whole of the creditors of the defendant, who had so proved their debts to the amount of 10*l.*, did, at such sitting, assent to the proposal of the defendant; and thereupon the Court of Bankruptcy did, at such sitting, to wit, on &c., for the purpose, amongst other things, of confirming the said proposal, appoint another sitting under the said petition, to be held on a then future day, to wit




in any respect a creditor of the defendant, or that the defendant was liable to or indebted to the plaintiff in any way whatever. That, on &c., and fourteen days before the last-mentioned private sitting was held, and after the plaintiff had so applied to the defendant for payment of the bill, notice in writing of the sitting so to be held as last aforesaid was personally served on every creditor of the defendant, who was not present by himself or by his appointed agent at the said first sitting, seven clear days at least before the day appointed for such second sitting, to wit, on the 28th of August, 1851, except upon the plaintiff. That, on the day and year last aforesaid, the Court of Bankruptcy in London did make a special order in the matter of the said petition, that service of such notice as last aforesaid at the last known place of abode of the plaintiff should be deemed good service. That, in pursuance of such order, and more than seven clear days before the day when the second sitting was to take place, and before the commencement of this suit, to wit, on &c., notice, as aforesaid, of the sitting was duly and according to the powers and provisions of the said Act served at the last known place of abode of the plaintiff, to wit, at &c., and such second sitting was duly held accordingly, after the said bill became due and payable, and before the commencement of this suit, at the time and place so appointed as aforesaid. That at such second sitting, divers, to wit, four other creditors of the defendant, did prove their debts. That three fifths in number and value of all those creditors of the defendant who had proved debts as aforesaid to the amount of 10%. at either of the said sittings, that is to say, as well three fifths of the said four other creditors who had proved at the said second sitting, as three fifths of the aforesaid ten creditors of the defendant who had proved at the said first sitting, to the amount of 10%, to wit, thirteen in all, did then and there agree to accept the said proposal of the defendant, which was so as-

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sented to at the first sitting, the terms whereof were then and there reduced to writing, and the said creditors did then and there sign the same; and the Court of Bankruptcy in London did thereupon then and there approve and confirm the said proposal and agreement, and did then and there cause it to be filed in the said Court of Bankruptcy and entered of record there, prout patet &c. That afterwards, and after the said bill became and was due and payable, and after the commencement of this suit, and within eight days now last past, to wit, on &c., the Court of Bankruptcy in London did give the defendant, under the hand of J. S. M. Fonblanque, Esq., then being a Commissioner of the Court of Bankruptcy in London acting in the matter of the said petition, and under the seal of the Court of Bankruptcy in London, a certificate in the form contained in the Schedule (Ac.) to the said Act annexed, setting forth that the defendant was a trader unable to meet his engagements with his creditors; and that he did, on &c., present his petition to the said Court of Bankruptcy in London, under the provisions of "The Bankrupt Law Consolidation Act, 1849," praying that a certain proposal (as aforesaid), or such modification thereof as by three fifths in number and value of his creditors might be determined, should be carried into effect under the superintendence and control of the said



and stating further that he, the Commissioner, did thereby certify the several matters aforesaid under his hand and the seal of the Court, that 14th day of April, 1852.—The plea then averred, “that the debt in the declaration mentioned was not contracted, nor was the bill given or accepted by the defendant, wholly or in part, by any manner of fraud or breach of trust,” &c., (negating the exceptions in the 221st section of the 12 & 13 Vict. c. 106).—Verification.

Demurrer, and joinder therein (a).

Hawkins argued in support of the demurrer (May 31).—The objections to this plea, which are matter of substance, are two-fold. First, it does not appear that any notice of the first private sitting was given to the plaintiff. Secondly, it is not averred that the resolution or agreement was carried into effect. The plea purports to be framed under the provisions of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), “with respect to arrangements between debtors and their creditors, under the superintendence and control of the Court.” The 211th (b)

(a) The plaintiff demurred specially on several grounds, which the decision of the Court renders it unnecessary to notice.

(b) The following are the material sections referred to in the course of the argument:—

Sect. 211 enacts, “That any such trader, unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the superintendence and control of the Court of Bankruptcy, and of submitting himself to the jurisdiction of the Court, in manner hereinafter mentioned, may present a petition to the Court, set-

ting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order; and the Court, on such petition, shall have power to grant such protection, and may renew the same from time to time as it shall think fit, and, if the petitioner be in prison or in custody for debt, may, except in the cases next hereinafter mentioned, order his immediate release, either absolutely or on condition, and may take bail for his attendance at the several sittings of the Court hereinafter mentioned: Provided always, that the Court shall not

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der, commitment, or sentence, and the pleadings or proceedings previously thereto, that he is in prison or in custody for any debt contracted by fraud or breach of trust, or by reason of any prosecution against him, whereby he had been convicted of any offence, or for any debt contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy: Provided also, that such release shall in no wise affect any rights of the creditor at whose suit such petitioner may be in prison or in custody against such petitioner, except the right of detaining him in prison or in custody whilst protected from imprisonment by order of the Court."

Sect. 213 enacts, "That forthwith, after the granting of any

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praying that his property and person may be protected from process; and the Court is empowered to grant

be in all respects as proofs in bankruptcy), and the petitioning trader shall attend and make oath of the truth of the account filed by him, and may be examined thereon; and if at such sitting, or at any adjournment thereof, three fifths in number and value of the creditors who have proved debts to the amount of 10*l*. shall assent to the proposal of such petitioner or to any modification thereof, the Court shall appoint another private sitting for the confirmation of such proposal or modified proposal, and such second sitting shall be held not earlier than fourteen days from the first sitting, and notice thereof in writing shall be personally served on every creditor who was not present by himself or his appointed agent at such first sitting seven clear days at least before the day appointed for such second sitting: Provided always, that the Court, if it shall think fit, may make order in any special case that service of such notice at the last known place of abode or business of any creditor shall be deemed good service."

Sect. 216 enacts, "That at such second sitting, or at any adjournment thereof, the creditors may also prove their debts; and if three fifths in number and value of those who have proved debts to the amount of 10*l*. shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors

shall sign the same; and such resolution or agreement (subject to such confirmation as is hereinafter mentioned) shall thenceforth be binding and of full force, as well against such petitioning trader as against all persons who were creditors at the date of his petition, and who had notice of the said several sittings of the Court; and the Court, if it shall think the same reasonable and proper to be executed, after hearing such creditors, by themselves, their counsel, or attornies, as may desire to be heard either for or against such resolution or agreement, shall approve and confirm the same, and cause it to be filed and entered of record, and shall grant to the petitioner a certificate of the filing and entering of record of such approval and confirmation, and shall from time to time indorse on such certificate a protection from arrest; and such petitioner shall be free from arrest at the suit of any person being a creditor at the date of his petition, and having had such several notice or notices as aforesaid; and any officer arresting such petitioner at the suit of any such creditor, and on sight of such certificate and protection not releasing such petitioner, shall be liable to such penalty as is provided respecting bankrupts in the like case: Provided, however, that no such protection shall be valid in favour of any such petitioner who shall be proved to have been about to abscond be-

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such protection. The 213th section requires the Court forthwith, after granting an order for protection, to appoint a private sitting, and further, that "notice of such private sitting shall be given in writing to every creditor." The plea admits that no notice of the private sitting was given to the plaintiff, but attempts to excuse the omission, by alleging that notice was given to every person whom the defendant knew to be a creditor; and that he did not know that the drawer had indorsed the bill in question to the plaintiff. The statute however is imperative, and renders notice to *every* creditor a condition precedent to the validity of the certificate. It contains no provision similar to the 75th section of the Insolvent Act, 1 & 2 Vict. c. 110, which empowers the Court to adjudge the prisoner discharged, not only as to debts

yond the jurisdiction of the Court, or who has concealed or is concealing any part of his estate or effects, nor against any creditor whose debt is not truly specified in the account filed by such petitioner, nor against any creditor whose debt has been contracted by such petitioner by any manner of fraud or breach of trust."

Sect. 221 enacts, "That so

carried into effect; and such certificate shall thenceforth operate, to all intents and purposes, as fully as if the same were a certificate of conformity under a bankruptcy, except only that any debt which shall have been contracted wholly or in part by reason of any manner of fraud or breach of trust, or without reasonable probability at the time of con-



due to the persons named in his schedule as creditors, but also "as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule." *Levy v. Horne* (a) decided, that a certificate granted under circumstances like the present, did not protect the acceptor of a bill from execution on a judgment by default in an action by an indorsee. If a different construction be put upon the statute, the debtor might evade it, by giving notice at the first meeting to those creditors only who were favourable to him; and if three fifths approved of the proposal, it would bind the rest, even though the number so approving did not form one twentieth part of the whole body of creditors.

Secondly, by the 221st section, the Court is to give the petitioner a certificate "so soon as the resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied according to the tenor thereof." But the plea contains no averment to that effect. The defect is not aided by the certificate, for that only states that the resolution or agreement had been carried into effect, and says nothing as to the creditors being satisfied. The requisites of the statute must be strictly pursued. A certificate under the 6 Geo. 4, c. 16, is invalid, although allowed by the Lord Chancellor, unless the Commissioners certify that there does not appear to them any reason to doubt the "truth" as well as the "fulness" of the discovery of the bankrupt's estate: *Wagner v. Imbrie* (b).

Watson (*Pearson* with him) in support of the plea.—The 221st section declares that, with certain exceptions, as in the case of fraud, &c., the certificate shall operate to all intents and purposes as fully as if the same were a

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(a) 5 Exch. 257.

(b) 6 Exch. 882.

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certificate of conformity under a bankruptcy. Now, it is evident that such certificate was intended to be final, notwithstanding all the previous requisites had not been complied with. By the 198th section, the Court of Bankruptcy is to judge of any objection against allowing the certificate of conformity, whether the allowance be opposed or not; and by the 200th section, "the certificate of conformity allowed under that Act shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy." By the 203rd section, the certificate may be recalled on the application of any creditor to the Vice-Chancellor. The 205th section, which provides for the case of a bankrupt arrested or sued for a debt proveable under his bankruptcy, enacts that the "certificate shall be sufficient evidence of the trading, bankruptcy, fiat or petition for adjudication, and other proceedings precedent to the obtaining such certificate." The 207th section declares that the allowance of the certificate by the Court, except in case of appeal, shall be final and conclusive. Under the "arrangement clauses," certain notices are required during the course of the proceedings; and there is a provision for granting the trader a certificate of protection from arrest. That protection, however, is only binding as against those persons who were enabled

have the same operation as a certificate in bankruptcy; and if a different construction be put upon it, the effect will be to exclude all cases of outstanding bills. Before granting the certificate, the Commissioner ought to inquire whether all the intermediate steps have been taken. In granting it he acts judicially, not ministerially; and his certificate, that "the resolution or agreement has been carried into effect," is final and conclusive, unless the case falls within the exceptions mentioned in the 221st section. That view is fortified by the 223rd section, which empowers the Commissioner in the cases therein mentioned to adjudge the petitioner a bankrupt. Where the legislature intended that creditors should not be bound unless they had notice it is so expressed, as in the 225th section, which relates to arrangements by deed. The Commissioner had a general jurisdiction over the subject-matter, and his adjudication upon it is binding, even though he may have proceeded *inverso ordine*: *Thomas v. Hudson* (a).

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The further argument having been adjourned until the 2nd of June, on that day

POLLOCK, C.B., said—It is unnecessary to hear the plaintiff's counsel in reply, as we are all of opinion that the plea is bad. One objection was, that the plea did not state that the resolution or agreement was carried into effect, and that the creditors were satisfied. Now, the 221st section of the 12 & 13 Vict. c. 106, enacts, that the Court shall give the petitioner a certificate "so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied according to the tenor thereof." I am therefore clearly of opinion that the plea ought to have contained an averment that the resolution or agreement had been car-


(a) 14 M. & W. 353.

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ried into effect, and that the creditors had been satisfied, according to the tenor thereof. It was also urged that the plea was bad, inasmuch as it did not allege that notice of the first sitting was given to the plaintiff. On that point it is unnecessary to express an opinion, as the plea is bad on the ground already mentioned; but I must observe that, in the clauses with respect to arrangements by deed, there is an express provision that the arrangement shall not be obligatory on creditors until after notice. There must be judgment for the plaintiff.

ALDERSON, B.—I am also of opinion that the plaintiff is entitled to judgment. I think that the operation of the certificate does not extend beyond those creditors who had notice; and further, that even if the certificate is not binding solely on them, this plea is bad; for the Court is only empowered to grant it "so soon as the resolution or agreement shall have been carried into effect, and the creditors shall have been satisfied." But this plea contains no allegation to that effect.

PLATT, B.—It seems to me that the certificate does not apply to creditors who have had no notice. By the 216th section, the resolution or agreement is to be binding "against all persons who were creditors at the date of the



son, which has been cited, was the case of a public officer who acted in strict obedience to the order of a Court having competent jurisdiction over the subject-matter. But that is no authority that a creditor may be deprived of his debt by the act of a Commissioner of the Court of Bankruptcy, not in conformity with the statute from which his power is derived; and no general doctrine arising from the circumstance of the Court being a Court of record can give the certificate of a Commissioner of Bankruptcy any such effect. The point as to notice is by no means so clear. I am inclined to think, that where a bill of exchange is outstanding in the hands of a person whom the petitioner was unable to discover, the certificate under the 221st section was intended to bar him. The time which, by the 225th section, must intervene between the first and the second sitting, when the creditors may express themselves satisfied with the proposal, was probably introduced in order that all the creditors might learn that such proceedings were going on; and in the event of any of the matters mentioned in the 223rd section having taken place, the Commissioner might adjudge the petitioner bankrupt. I am inclined to think that, before the creditors whose names are mentioned in the petition are satisfied, the creditors who have received no notice may arrest the debtor, but that, after the certificate is granted, it is binding on all. I am, however, clearly of opinion that this plea is bad in substance.

Judgment for the plaintiff (*a*).

(*a*) Affirmed on error, Exch. Chamber, 29 January, 1852, post, Vol. 8.

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THE GOVERNORS OF THE BEDFORD GENERAL INFIRMARY,
in the Town of BEDFORD, in the County of BEDFORD,
Appellants, v. THE COMMISSIONERS FOR THE IMPROVE-
MENT OF THE TOWN OF BEDFORD, in the County of BED-
FORD, Respondents.

May 31.

A local Act imposed a cer-
tain rate on "all
halls, gaols, cha-
pels, meeting-
houses, schools,
almshouses, and
other public
buildings,
churchyards,
chapel-yards,
and meeting-
house-yards, for
every yard run-
ning measure of
the length in
front of such
halls, gaols, cha-
pels," &c. An
Infirmary for
sick persons,
supported by
voluntary con-
tributions, stood
within its own
grounds, the
principal en-
trance to which
was on the north

IN this case, the appellants having been rated under the 43 Geo. 3, c. cxxviii. and 50 Geo. 3, c. lxxxii., in respect of the Bedford Infirmary and Fever Hospital, gave notice of appeal to the Quarter Sessions; and the following case was, by order of *Martin, B.*, stated for the decision of this Court (a).

By an Act (local and personal) 43 Geo. 3, c. cxxviii., (1803), intituled "An Act for the Improvement of the Town of Bedford, in the county of Bedford, and for Rebuilding the Bridge over the river Ouse, in the said town," (Sect. 1), the respondents are constituted Commissioners for putting the Act into execution, by the style of "The Commissioners for the Improvement of the Town of Bedford in the County of Bedford," and by such name and description should and might sue and plead and be sued in all Courts and places whatsoever.

By sect. 50, for raising money to enable the Commis-

sioners to carry the several purposes of the Act into execution, they are empowered to make rates upon houses and other private properties, but not to exceed in the whole, in any one year, 8*d.* in the pound, according to the yearly rent or value of such houses, &c.

By sect. 59, it is enacted—"That the sum of 1*s.*, and no more, shall yearly be rated and assessed upon all halls, gaols, chapels, meeting-houses, schools, almshouses (except the almshouses founded by Christie Skinner, deceased), and other public buildings, churchyards, chapel-yards, and meeting-house-yards, within the said town, for every yard running measure of the length in front of such halls, gaols, chapels, meeting-houses, schools, almshouses, and other public buildings, churchyards, chapel-yards, and meeting-house-yards; and the rates or assessments so to be made and laid upon any school, almshouse, or other public building not hereinbefore mentioned, shall be paid by the respective masters, trustees, or managers thereof."

By sect. 117, a power of appeal is given to persons aggrieved by any rate or assessment.

By another Act (local and personal), 50 Geo. 3, c. lxxxii. s. 2, (1810), the power of rating public buildings was extended from 1*s.* to 1*s.* 6*d.* per yard running measure in front; but the Act of 43 Geo. 3, was not in any other respect altered as regards the matter of this case.

The Infirmary and Fever Hospital are one institution, comprising two detached buildings, distinguished by those names, with requisite offices, gardens, and airing-grounds. The Fever Hospital is as much as possible separated from the Infirmary, to guard against infectious communication. The institution is called "The Bedford General Infirmary," for the relief of the sick and lame poor of all countries; and the regulation and government thereof are vested in benefactors of not less than 20 guineas and annual subscribers of not less than 2*l.* 2*s.* each, who are denominated

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"Governors;" but they are not incorporated by charter otherwise. That part of the institution which is called the Infirmary was opened on the 13th of August, 1806, for the reception of county patients only, for whom on it was then intended, but was afterwards enlarged by private subscriptions, for the general reception of all patients. The Fever Hospital was erected on ground belonging to and adjoining the Infirmary, and opened for the reception of patients 24th of June, 1848.

The institution, in its present and original state, was founded and is supported by private donations and voluntary annual subscriptions, and patients are only admissible by the order or recommendation of a governor.

The Infirmary and Fever Hospital are surrounded on all sides by the grounds attached to them; the principal entrance to the Infirmary is on the south-east side, which is approached from a turnpike road by a circular drive through a court or garden of the Infirmary, adjoining the road. There is also an entrance on the opposite or north-west side, which is approached from the Kempston-road by a private carriage or occupation road, and an avenue through pasture land, not occupied by the governors, and continued through the court or garden of the Infirmary on that side. The Fever Hospital was erected on the Infirmary ground, but stands detached from the Infirmary in the

that the governors are liable to be rated in respect of all sides of the ground or area of the said institution, (comprising Infirmary and Fever Hospital), having a frontage or aspect towards or adjoining any public way; and the running measure stated in the rate includes the whole of the south-east, north-east, and north-west sides of the area or ground.

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BEDFORD, Resp.

The point for the Court to decide is, whether the appellants are liable to be rated in the said rate or assessment in respect of the Infirmary and Fever Hospital, or either of them; if they are not, the assessment is to be amended by striking out that portion of it.

If the Court shall decide that the appellants are rateable in respect of the Infirmary or Fever Hospital, then the amount of rate is to be ascertained on such principle as the Court shall determine; and the said portion of the rate shall be amended upon the said principle so determined by the Court. In either case, such costs to be paid as this Court shall adjudge, and judgment to be entered by the Court of Quarter Sessions for the said borough accordingly.

Worlledge for the respondents.—The first question is, whether the Infirmary and Fever Hospital are *public buildings* within the meaning of the 59th section of the 43 Geo. 3, c. cxxviii. It is submitted that they are. They are buildings of the same description as others mentioned in that section, which are clearly public buildings; for instance, almshouses, which are supported by voluntary donations. A public building cannot be defined as “a building to which all the public have a right of access,” since they have no right to enter a public school or a prison. Then, secondly, upon what principle are these buildings to be rated? It is conceded that the rate cannot be supported as regards the north-west side, where the pasture land adjoins the Kempston-road; but the rate is properly assessed in re-

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spect of the running measure along the whole of the south-east and north-east sides, the former of which is bounded by the Ampthill-road, and the latter by a public footway, extending to the Kempston-road. The case *The Justices of Bedfordshire v. The Commissioners for the Improvement of Bedford*(a), shews that it is immaterial whether there is any entrance from the footway into the Infirmary. The Commissioners are bound to repair the footway, and are therefore entitled to levy a rate in respect of it.

Pearse for the appellants.—First, these are not public buildings within the Act. The rule of construction laid down in the *Archbishop of Canterbury's case*(b) is, that "where an Act of Parliament begins with words which describe things or persons of an inferior degree, and concludes with general words, the general words shall not be extended to any thing or person of a higher degree." This rule was adopted in the case of *Casher v. Holmes*(c) where a statute imposed certain specified duties on copper, brass, pewter, tin, "and all other metals not enumerated," and it was held that the latter words did not include gold and silver. So here the words "other public buildings," must be construed as buildings ejusdem generis with those previously mentioned. [Lalorson, B.—The

of the building. If so, this consequence would follow, that where a charitable person gave to an infirmary a field abutting on a public road, the institution would become rateable in respect of it, although the field was not before subject to assessment. That the language of the statute cannot be construed literally, is evident from the 32nd section, which requires every inhabitant, in certain cases, to sweep the pavement opposite his house. Yet it could never be intended that the enactment applied to the front of a house standing within a field. At all events, this rate is improperly assessed, inasmuch as it includes the running measure along the entire footway on the north-east, whereas, on that side, it should be limited to so much of the running measure as is bounded by the grounds of the hospital, exclusive of that part adjoining the pasture land.

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Worlledge, in reply, was stopped by the Court.

POLLOCK, C. B.—We are all of opinion that the rate must be amended, by limiting it on the north-east side to so much of the running measure as extends along the grounds of the Infirmary up to the point where the pasture land begins. Two questions are raised for our consideration: first, whether this institution is a public building liable to be rated; and, if so, secondly, in what manner the frontage is to be assessed. With reference to the first question, it is plain that no hospital or public institution of this description is specifically mentioned in the 59th section; and it is also true, that the mode in which the approaches to buildings liable to assessment are to be rated, is not pointed out by that section. But if its language be referred to, it is clear, from the expression “gaols,” that it was not intended to limit the rate to public buildings beneficially occupied. The word “school” must mean a “public school;” and if this institution be not a public

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building within the meaning of that section, I scarce know what is. My Brother *Alderson* has remarked, the section means only buildings *ejusdem generis*, which is the genus to exclude this Infirmary and Hospital? In my judgment they are public buildings liable to be rated. Then comes the question, how are they to be assessed? The 59th section makes no distinction between public general ways for carts, horses, and foot-passengers, and for ways; but formerly the Corporation of Bedford was liable to repair the streets and public places, some of which were mere footways; and now the legislature has omitted to make any distinction in that respect, but requires a certain sum to be paid for every yard running measure without reference to buildings like this Infirmary, abutting upon a road and also a footway, from which there is an entrance. Suppose a churchyard, with a small opening at the back of it, only sufficient to admit the bearers of a coffin, if the other side abutted on a public way it would be considered as having a frontage towards the street, although there was no entrance there. Applying the view which that case presents, I think that the length in front of this building is the whole length abutting on the road and footway, until it comes to the pasture land, where the property belongs to some other person. The assessments ought therefore to be corrected, by measuring the ground

scholars, governors, and those who have the privilege of sending scholars. So also, with respect to almshouses, it is not the whole world who are permitted to enter, but only the occupants, and those who subscribe to the charity. It is clear, however, that the statute treats almshouses as public buildings, for it excepts from the rate thereby imposed certain almshouses, which would therefore have to be assessed as private buildings. Then, as to the other point, we decided last Term, that if a gaol abutted on a public road, where the frontage and gate of access was, that was to be part of the running measure. But, inasmuch as in that case one side of the gaol abutted on a public highway, from which there was no entrance, but which was bounded by the outside wall of the gaol, it was contended that such part of the gaol did not abut on the highway; but the Court, taking into consideration the case of a churchyard, or meeting-house-yard, held, that the circumstance of there being no aperture in the wall made no difference, and that the wall was part of the frontage of the gaol. Then let us apply the principle of that decision to the present case. One side of these premises is bounded by a narrow alley, from which there is no entrance to the hospital; but the decision of last Term, to which I adhere, shews that the absence of an aperture is unimportant, and that, as the buildings abut on a public footway, they are liable to be rated.

PLATT, B.—I am of the same opinion. This Hospital may be called a public building, because it is a building devoted to public purposes. All those buildings which are not devoted to public purposes are to be rated as private buildings. Then, having determined that this comes within the definition of a public building, how is it to be rated? The decision of this Court last Term lays down a very convenient rule, which we ought to adhere to, otherwise the law would be uncertain. It is not every gaol

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abut upon roads which require to be kept clean and watched, they are to be part of the rate, although there is no entrance from the building.

MARTIN, R.—I am of the same opinion. I do not doubt that this is a public building devoted to the reception, not of soldiers, but of any sick persons who may be brought there. The object of the rate is to provide for the maintenance of the building, and it is not unreasonable that a public building should give a portion of the rate common with others, for rendering it a public building. With respect to the other point, with reference to the decision of last Term; though I do not think the judgment might have been considered in any other way, for we were called upon to consider the case in Parliament, with regard to a state of things which the framer of it never thought of. It is not imposed in respect of this footway, but in respect of the public building. Acting upon the principle that the rate is rated for every yard of the running of the road before the building. The principle means every part bordering on the road. Acting to that judgment, we must apply the rate to the building.

1852.

THE GUARDIANS OF THE POOR OF THE BEDFORD UNION,
Appellants, v. THE COMMISSIONERS FOR THE IMPROVE-
MENT OF THE TOWN OF BEDFORD, in the County of BED-
FORD, Respondents.

May 31.

IN this case, the appellants, having been rated under the 43 Geo. 3, c. cxxviii. and 50 Geo. 3, c. lxxxii., in respect of the workhouse of the Bedford Union, gave notice of appeal to the Quarter Sessions; and the following case was, by order of *Martin*, B., stated for the decision of this Court.

[The case referred to the 43 Geo. 3, c. cxxviii., ss. 1, 50, 59, 117, and 50 Geo. 3, c. lxxxii., as in the previous case (*a*), and proceeded:]—By the 34 Geo. 3, c. xcvi. (sect. 1), certain persons inhabiting within the parishes of St. Paul, St. Mary, &c., in the town of Bedford, were incorporated by the name of “The Guardians of the Poor within the town of Bedford, in the county of Bedford.”

By section 2, the Guardians are to appoint twelve of their body, to be called “Directors of the Poor within the town of Bedford;” who, by the 21st section, are vested with the control and management, and are to provide for the maintenance and employment, of the poor.

By the 15th section, the directors are empowered to purchase land, and erect thereon a house or houses for the purposes of the Act, to be called “The Bedford House of Industry.”

By the 19th section, “all the houses, lands, tenements, and hereditaments, to be hired or purchased under the authority of this Act, and all buildings which may hereafter be erected or altered by virtue thereof, shall be free from all parochial and parliamentary taxes, except such taxes and to such amount as they shall be assessed at the time they shall be first taken and applied for the purposes of this Act.”

The 34 Geo. 3, c. xcvi. enabled the directors of the poor of Bedford to erect a workhouse, and enacted, that all buildings erected by virtue of that Act should be free from “all parochial and parliamentary taxes.”—*Held*, that a workhouse erected under the provisions of that Act was liable to be assessed under the 43 Geo. 3, c. cxxviii., which imposed a rate on public buildings for the improvement of the town of Bedford.

(*a*) Ante, p. 768.

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Under the provisions of the 34 Geo. 3, the directors purchased land and erected thereon a house, with requisite offices, for the purposes of the Act, called "The Bedford House of Industry;" and the poor received into the house were under the control and management of the directors until the 21st September, 1835, when the following order of the Poor Law Commissioners came into operation:—

[The case then set out the order, by which certain parishes were added to the parishes of the town of Bedford, so as to form "The Bedford Union;" and the order directed that the guardians of the Union should rent of the guardians or directors of the poor within the town of Bedford the poor-house, called "The Bedford House of Industry."]

The point for the Court to decide is, whether the appellants are liable to be rated in respect of the workhouse(a); and if they are not, the assessment is to be amended.

Worledge for the respondents.—The appellants will contend that this workhouse is not liable to be rated, inasmuch as, under the 19th section of the 34 Geo. 3, c. xcvi., it is free from all parochial and parliamentary taxes. But that argument is entirely unavailing.

does not in terms refer to the 34 Geo. 3, c. xcvi.iii.; and their provisions are not inconsistent. *Williams v. Pritchard*(a) decided that houses built on lands embanked from the Thames, in pursuance of the 7 Geo. 3, c. 37, which vests those lands in the owners free from taxes, are not liable to be assessed to the general land-tax imposed by the 27 Geo. 3, c. 5.—[*Alderson*, B.—The language of the 7 Geo. 3, c. 37, s. 51, is “free from all taxes and assessments whatsoever.” The words of the 34 Geo. 3, c. xcvi.iii., are “free from all parochial and *parliamentary* taxes.” A parliamentary tax is a tax imposed directly by act of parliament, and for the benefit of the whole kingdom, which the rate in question is not. The meaning of a “parliamentary tax” was considered in *Palmer v. Earith* (b). *Platt*, B.—In that case the very distinction is pointed out which has been adverted to by my Brother *Alderson*.]

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POLLOCK, C. B.—We are all (c) of opinion that this building is liable to be rated.

Rate affirmed.

(a) 4 T. R. 2.

(b) 14 M. & W. 428.

(c) *Pollock*, C. B., *Alderson*, B.,
Platt, B.

1852.

May 31,
June 2.

HORTON v. THE WESTMINSTER IMPROVEMENT COMMISSIONERS.

In an action against The Westminster Improvement Commissioners, the declaration stated, that the defendants, by their writing obligatory, acknowledged that they, by virtue of the Westminster Improvement Acts, 1845 and 1847, were bound to P. in a certain sum, subject to a condition for repayment, which recited "that, by virtue of the

said Acts, the defendants were authorised to borrow any sum of money for the purposes of the Acts, and to secure the same by their bonds; and that the defendants, in pursuance of the Acts, had borrowed of P. 5000*l.*, for enabling them to carry the purposes of the Acts into execution." The declaration then stated, that P., according to the provisions of the Westminster Improvement Act, assigned the bond to the plaintiff; and alleged as a breach the nonpayment to the plaintiff of interest. Seventh plea, that the defendants did not, in pursuance of the said Acts, borrow of P. the said sum for enabling them to carry the purposes of the Acts into execution, nor was the same lent by P. for that purpose; and that the writing obligatory was not made by the defendants for securing the payment of any sum of money borrowed by the defendants for the purposes of and under the powers and

DEBT.—The declaration stated, that the defendants, by their writing obligatory, sealed with their common seal, (proferat), acknowledged that they, by virtue of the "Westminster Improvement Act, 1845," and the "Westminster Improvement Act, 1847," were held and firmly bound to T. Pooley in the sum of 10,000*l.*, &c.; which bond was subject to a condition thereunder written, whereby, after reciting that under and by virtue of the said Acts of Parliament the defendants were authorised to borrow any sum of money for the purposes of the said Acts, and to secure the same by their bonds, as in the said Acts mentioned; and that the defendants, in pursuance of the said Acts, had, upon the day of the date of the bond, borrowed of T.

Pooley 5000*l.*, for enabling them to carry the purposes of the said Acts into execution, the condition of the said writing obligatory was declared to be, &c., (setting out the condition, which was for payment of the principal at the end of three years, and interest half-yearly). The declaration then stated, that the condition was subject to a proviso, enabling the defendants to pay off the principal, on giving three calendar months notice, and averred that the bond was duly stamped; and that, within fourteen days after the date thereof, a memorial, according to the provisions of the Westminster Improvement Act, 1845, was made by the defendants' clerk in the register of mortgages and bonds, of the number and date of the bond, and of the parties thereto, with their proper additions; whereupon T. Pooley then became entitled to the bond, and to all right and interest therein. It then stated, that T. Pooley, by deed duly stamped, in consideration of 5000*l.* paid by the plaintiff, transferred to him the bond; and that within thirty days after the date thereof the deed was produced to the clerk of the defendants, who thereupon caused a memorial of the transfer to be made in the same manner as in the case of the original bond; whereupon the plaintiff became entitled to the benefit of the original bond. The declaration then alleged, that 125*l.* was due for interest, and was duly demanded; and that, although a reasonable time had elapsed, no part had been paid; *actio accrevit &c.*

The defendants pleaded (*inter alia*) seventhly—That they did not, in pursuance of the said Acts of Parliament, or of the Westminster Improvement Act, 1850, borrow of T. Pooley the sum of 5000*l.* or any part thereof, for enabling them to carry the purposes of the Acts or any or either of them into execution, nor was the same lent or advanced by T. Pooley or any other person for those purposes. That the writing obligatory was not made by the defendants for securing the payment of any sum of money

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borrowed or taken up by the defendants for the purposes of and under the powers and provisions of the said Acts, or of the Westminster Improvement Act, 1850, or any or either of them. And the defendants were not, under or by virtue of the said Acts, or any or either of them, directed, authorised, or empowered to make the writing obligatory, nor was the same made by them under or by virtue or in pursuance of the said Acts, or any or either of them; and the same was made contrary to the provisions of those Acts.—Averments, that Pooley and the plaintiff had notice of the premises.—Verification.

Eighth plea—That, before the making of the writing obligatory, to wit, on &c., C. Morrisson and W. Mackenzie were, subject to certain terms and conditions, entitled to receive from the defendants certain bonds, to be thereafter issued and made, and sealed by the defendants under their common seal, and to be conditioned respectively for the payment by the defendants or their successors to the obligees to be named in such bonds, at the end of three years from the dates of such bonds, of divers sums of money &c., with interest, payable half-yearly. That T. Pooley and A. G. Pooley, and divers other persons, whose names are to the defendants unknown, afterwards, and before the making of the said writing obligatory, and the making of the bonds

persuade, and cause and procure C. Morrisson and W. Mackenzie, to contract and agree with T. Pooley, amongst other things, that T. Pooley should have, and that C. Morrisson and W. Mackenzie should cause to be delivered to T. Pooley, the bonds of the defendants, to which C. Morrisson and W. Mackenzie were so entitled. That T. Pooley and A. G. Pooley, in further pursuance of the said conspiracy, and by means of the said fraud and covin, and before C. Morrisson and W. Mackenzie, and the defendants, or any or either of them had discovered the same, or had any notice or knowledge thereof, did afterwards, to wit, on &c., cause and procure C. Morrisson and W. Mackenzie to request and direct the defendants to make and deliver, and to cause and to procure them to make and deliver, the bonds to which C. Morrisson and W. Mackenzie were so entitled, and, amongst others, the writing obligatory in the declaration mentioned, and to make and deliver the same to T. Pooley as the obligee thereof, in the lieu and stead of C. Morrisson and W. Mackenzie as the obligees thereof. That T. Pooley and A. G. Pooley, in further pursuance of the conspiracy, and by means of the fraud and covin, did afterwards, to wit, on &c., cause and procure the defendants to make and deliver, and they did make and deliver, the writing obligatory in the declaration mentioned, as and for and being one of the bonds to which C. Morrisson and W. Mackenzie were so entitled; and T. Pooley took and received the same as and for one of such bonds. That they never did, at any time, borrow of T. Pooley, nor did he lend to them, the sum of 5000*l.*, or any part thereof, as in the condition of the writing obligatory is recited. That the plaintiff, before and at the time of the transfer of the writing obligatory, had notice of the premises; and C. Morrisson and W. Mackenzie, before the commencement of this suit, to wit, on &c., gave the defendants notice, and required them not to pay, and

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forbad them and still forbid them paying, the monies by the writing obligatory so payable.—Verification.

General demurrer to both pleas, and joinder therein.

Willes (Garth with him), in support of the demurrers.—The seventh plea is bad, on two grounds: First, it attempts to raise an issue which is wholly immaterial. The 8 & 9 Vict. c. cxxviii. s. 37, enacts, "That it shall be lawful for the Commissioners from time to time to borrow at interest any sum of money which *they shall judge necessary* for the purposes of this Act;" and for securing the re-payment thereof, with interest, the Commissioners may mortgage lands, &c., "or may secure the same by bond duly stamped." The plea states, that they did not, in pursuance of the Acts, borrow the money to enable them to carry the purposes of the Acts into execution. That however is immaterial, for the Commissioners have a special discretion vested in them; and if they judged it necessary that the money should be borrowed, they had power to borrow it, although the loan might be unnecessary for the purposes of the Acts. Secondly, the defendants are estopped from setting up this defence, since it contradicts the facts alleged on the face of the bond. *Fairtitle d. Mytton v. Gilbert* (a) will perhaps be cited as an authority to shew that Commissioners, acting for the benefit of the public

estoppel," distinguish between a case where the contracting parties must be presumed to have known that what appeared on the face of the instrument was not authorised by the statute, and so to have qualified their contract accordingly,—and where the estoppel is with reference to some fact dehors the instrument, and as to which no presumption of knowledge can arise. In *Regina v. White* (a), counsel having argued on the authority of *Fairtitle d. Mytton v. Gilbert*, "that trustees acting under a statute are not estopped by anything that they have done contrary to the statute;" Lord *Denman*, C. J., said, "We have held that this is true only of a statute, the contents of which are publicly known; such a statute is to have effect, whatever dealings may take place; but where the persons acting, whether trustees for public purposes or not, have done any act which was not known to the parties with whom they were afterwards dealing, such an act cannot prevent the estoppel arising from that subsequent dealing." Here the plaintiff could have no means of knowing whether the money was necessary for the purposes of the Act.

The eighth plea is also bad. It does not aver that any fraud was practised upon the defendants, so that they might avoid their contract; but only states that, *Morrisson* and *Mackenzie* being entitled to certain bonds, *Pooley* conspired with other persons to defraud *Morrisson* and *Mackenzie*; and such conspiracy caused the defendants, at the request of *Morrisson* and *Mackenzie*, to deliver the bond in question to *Pooley*, who assigned it to the plaintiff. Those facts might render the plaintiff a trustee in equity for *Morrisson* and *Mackenzie*, but they afford no defence at law. The defendants were bound to deliver the bond to *Morrisson* and *Mackenzie*, or to such person as they should appoint; and that obligation has been fulfilled by the delivery to their nominee. It is as if, to an action

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(a) 4 Q. B. 101.

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by a trustee, the defendant should plead that the cestui que trust forbade him to pay the plaintiff. There is neither precedent nor authority for this plea. Fraud is no defence *at law*, unless it has been practised upon the party who, on that ground, seeks to defeat the contract, and by the party who attempts to enforce it. If Morrisson and Mackenzie were to sue the Commissioners for money lent, it would be a good defence to plead that they gave a bond according to the directions of Morrisson and Mackenzie; and it would be no answer for the latter to reply, that they were induced to give those directions by the fraud of a third party. The election to treat as valid or invalid a transaction tainted with fraud rests with the person on whom the fraud has been committed, not with strangers.—He cited *Campbell v. Fleming* (a), *Gorgier v. Mieville* (b).

Bramwell (*Honyman* with him), contra.—The seventh plea affords a good defence to the action. The Commissioners are only empowered to borrow money to enable them to carry into execution the purposes of the Acts; and it is expressly alleged, that this bond was not given as a security for money so borrowed. A Railway Company, incorporated by Act of Parliament, and empowered to raise money for a particular purpose, cannot lawfully appropriate the money to a purpose not contemplated by

of the 8 & 9 Vict. c. clxxviii.] Further, the defendants are not estopped from setting up this defence. The donee of a limited power cannot, in the exercise of it, extend the power by any act of his own. It is true that the defendants have put their seal to this instrument; but as the Acts do not authorise it, they are not estopped from shewing that fact. *Doe d. Levy v. Horne*(a) only shews that the Commissioners would be estopped by the recital of some act done by them within scope of that authority, even though the recital was untrue. But that has no application here, for the objection is that they had no power to do what they are stated to have done; and to allow an estoppel would be to confer on them powers beyond the statute. Then with respect to the eighth plea:—The defendants have a right to avail themselves of any defence Morrisson and Mackenzie would have had, if Pooley had been the plaintiff, and Morrisson and Mackenzie the defendants. Whoever is sought to be charged by a contract tainted with fraud, may set up fraud as a defence. Moreover, the plea contains an allegation of fraud upon the defendants, because it states that the bond was made and delivered by them to Pooley. *Pidcock v. Bishop*(b), and *Jackson v. Duchaire*(c), are authorities to shew that a contract, which is a fraud upon third persons, is void as between the parties to it. It is the same in principle as where a debtor secretly agrees with one of several creditors who have executed a composition-deed to pay that creditor more than the stipulated sum, which agreement is void as a fraud upon the other creditors. It is a sound legal maxim, *ex dolo malo non oritur actio*: Broom's Maxims, 571. Lord Mansfield, C. J., in *Holman v. Johnson*(d), treats it as a principle of public policy, and observes that, "no Court will lend its aid to a man who

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(a) 3 Q. B. 757.

(c) 3 T. R. 551.

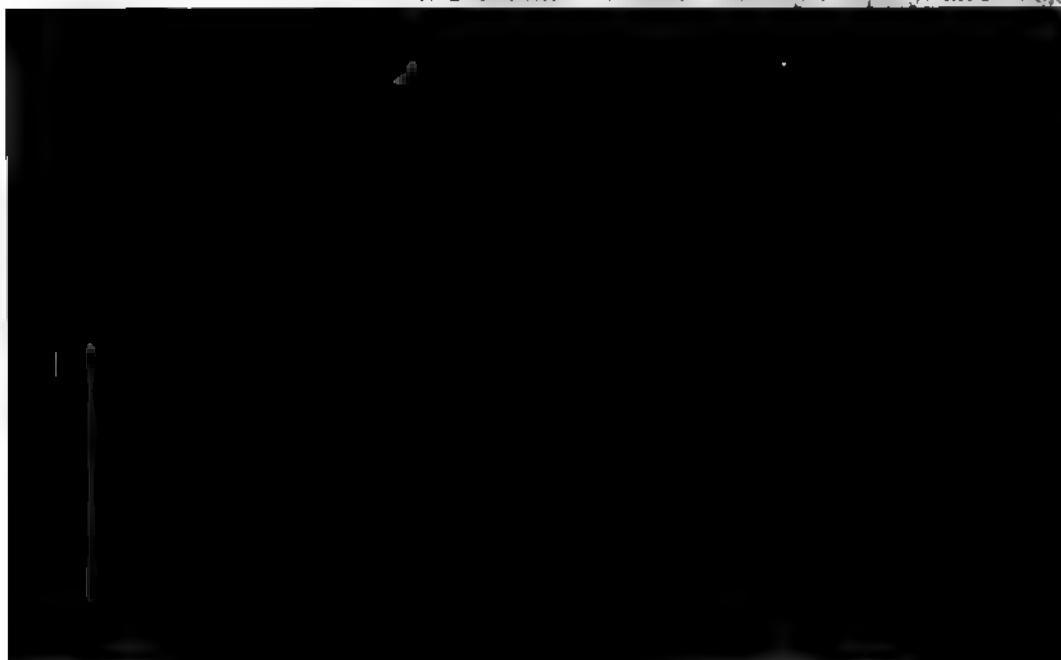
(b) 3 B. & C. 605.

(d) Cowp. 343.

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founds his cause of action upon an immoral or an illegal act." That principle has been invariably acted [Pollock, C. B.—The doctrine was carried to an extreme point in *Cannan v. Bryce* (a), where it was held that morulent, and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, which the lender was no party, could not be recovered back by him.] In *Wright v. Tallis* (b), it was held that no copyright could be acquired in a book which was falsely represented as a translation from an original work of a celebrated author, in order to impose upon the public and induce them to give a higher price for the copies. *Hardman v. Willcock* (c), an agent, to whom goods were intrusted for sale, was allowed to set up the fraud of the principal and a third person, in order to defeat an action by the principal for the proceeds of the sale. Where fraud is practised on a person, who in consequence induces a third party to do some act, the latter is affected by the fraud, and may set it up as a defence. *Pastor Popham* (d), and *The Gas Light and Coke Company v. Turner* (e), are also authorities to shew that this plea is good on general demurrer.

Willes in reply.—*The East Anglian Railway Company v. The Eastern Counties Railway Company, and Gage*



may think necessary. With respect to the other plea, *Carr v. Kearsley* (a) and *Taylor v. Croker* (b) are authorities to shew that the facts therein stated do not render the bond void; for there is no fraud on the part of the Commissioners, and they could never be compelled to give another to Morrisson and Mackenzie. The authorities relied on are cases in which the parties were in *pari delicto*.—He referred to *Smith v. Cuff* (c), *Hill v. The Proprietors of the Manchester Water Works* (d), *Doe d. Jones v. Jones* (e).

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POLLOCK, C. B.—Neither of these pleas presents any answer to the plaintiff's claim. The first, in effect, states that the defendants had no power under the statutes to make the bond, and therefore they are not bound by it. That plea clearly cannot be sustained. The Commissioners may have thought it right that the money should be borrowed, and, having judged it necessary, that is sufficient to render the transaction legal.

The other plea is worthy of more consideration. A great deal of learning has been introduced to shew that the defendants may set up, as a defence, the fraudulent conduct of third parties. In my opinion they cannot set up the defence raised by this plea. It is not like the case where a plaintiff is seeking to enforce a contract with the defendant, and fraud is disclosed by the plea, which shews that there never was any valid contract. In this case there is a contract, which, on the face of it, is perfectly legal; and the Commissioners, by their bond, are bound to some one. Then it is said that they are not bound to the plaintiff, because an arrangement was made, by which they were induced to give the bond to a wrong person. But that was by the authority of the right parties; and if the latter were imposed upon, the remedy is in a Court of

(a) 4 Esp. 169.

(d) 2 B. & Ad. 544.

(b) 4 Esp. 187.

(e) 5 Exch. 16.

(c) 6 M. & Selw. 160.

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equity. Upon this short ground I think that the plea affords no answer, and that the plaintiff is entitled to judgment.

ALDERSON, B.—I am of the same opinion. The first of these pleas does not raise a proper issue, because the defendants are authorised by the statute to borrow such sums of money as they shall judge necessary for the execution of their duties; and it is not averred that they did not judge it necessary to borrow the sum for which this bond was given. The second question is, whether the defendants are entitled to set up the *jus tertii*—that is, the right of Morrisson and Mackenzie to this bond. It is admitted that Morrisson and Mackenzie did, in point of fact, authorise the defendants to make this bond in the name of Pooley; but it is said that Morrisson and Mackenzie did not give a real authority, because they were induced to give the authority by reason of fraud. That might be a ground for avoiding the bond in a Court of equity, or it might render Pooley, or the plaintiff as his assignee, a trustee for Mackenzie and Morrisson, but it affords no defence in a Court of law.

PLATT, B.—I am of the same opinion. The Commissioners are empowered to borrow such sum of money as



But how does that affect the liability of the defendants? If Morrisson and Mackenzie had sued the defendants for the money borrowed, the latter might have pleaded that they gave a bond for the amount to the person nominated by Morrisson and Mackenzie. If there is really any fraud in the transaction, the remedy is in a Court of equity, which can do complete justice by bringing all parties before it.

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MARTIN, B.—I am of the same opinion. This is an action upon an instrument *under seal*, whereby the defendants have contracted to do certain acts; and in order to excuse themselves from performing them, they ought to make out a clear *legal* defence. Now, the instrument itself states that the defendants were authorised to borrow money for the purposes of the Acts; and that, in pursuance of the Acts, they had borrowed the money for which this bond was given. The first of these pleas in effect states, that the money was not borrowed for the purposes of the Acts; but I think that the defendants are estopped from setting up any such defence. It has been argued that the doctrine of estoppel does not apply here; but the case of *Hill v. The Proprietors of the Manchester Water Works* (a) satisfies me that it does. The meaning of estoppel is this—that the parties agree, for the purpose of a particular transaction, to state certain facts as true; and that, so far as regards that transaction, there shall be no question about them. But the whole matter is opened where the statement is made for the purpose of concealing an illegal contract; for persons cannot be allowed to escape from the law by making a false statement. That is totally different from this case; for here the contract itself is perfectly legal, and though the plea is not the same, yet the case is substantially the same as that of *Hill v. The Pro-*

(a) 2 B. & Ad. 544.

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prietors of the Manchester Water Works, which, in judgment, is good law and good sense.

With respect to the other plea, the defendants carefully abstain from saying that any fraud was practised up themselves, and only allege that it was practised up Morrisson and Mackenzie, whereby they were induced direct the defendants to give the bond to Pooley. But authority has been cited which shews that those circumstances render the bond void; and the Court ought to slow to allow parties to set up any such defence, especially to a contract under seal.

Judgment for the plaintiff

THE GUARDIANS OF THE POOR OF THE ROMFORD UNION
 THE BRITISH GUARANTEE ASSOCIATION.

A declaration stated, that, by a deed between B. of the first part, the defendants of the second part, and the plaintiff of the third part, after reciting that B. had

COVENANT.—The declaration stated that, by a deed made between W. Beadle of the first part, the defendant of the second part, and the plaintiffs of the third part (profert); after reciting that W. Beadle had been appointed to the office of collector of poor-rates for the parish of Barking and Dagenham, and that he had been requir

to find security for the due and faithful discharge of his duties while he should be employed in the said office; and that the defendants, at his request, had consented to give such security upon the terms and subject to the provisoes and conditions therein contained; the defendants, as surety for W. Beadle, did covenant with the plaintiffs that W. Beadle should and would, from time to time and at all times thereafter whilst he continued in his said office of collector of poor rates, duly and faithfully discharge the duties of the office, and in particular should and would faithfully, honestly, and punctually account to the plaintiffs for all and every sum and sums of money, bank-notes, &c., which he, whilst acting in his said office, should from time to time receive. And the defendants further thereby covenanted with the plaintiffs that a certificate, under the hand of the auditor of the district within the said Union, stating the amount of any loss occasioned by the acts or default of any payment or duty by W. Beadle while in his said office, should be sufficient and conclusive evidence against the said Association of the truth of the certificate, and that the policy had become forfeited thereby to the amount of the loss stated in such certificate, and should form a valid and binding charge and claim against the Association, without any further or other proof being given by the plaintiffs in any action to enforce the policy against the defendants of the amount of such damage or loss, or that the same had been sustained, incurred, or occasioned by and through the acts or act or default of W. Beadle. Averments, that, after the making of the deed, and whilst W. Beadle continued in his said office of collector, he did not faithfully, &c., account to the plaintiffs for divers sums of money, amounting to 2000*l.*, which he, whilst acting in his said office, and after the making of the said deed, did, from time to time, by virtue of his office, receive for poor-rates of the said parishes; and although a reasonable time for W.

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Beadle to account for the said money had elapsed, and was requested so to do, yet he had not accounted for the said sums, but had converted the same to his own use, which the defendants had notice, and were requested pay the loss to the extent of 800*l.*; and E. Banks, the auditor for the said district, afterwards certified under his hand to the plaintiffs and defendants, that a loss had been occasioned to the plaintiffs by means of the premises to the amount of 800*l.*, of which the defendants had notice. Breach, non-payment of the said sum of 800*l.*

Plea to the declaration, so far as it relates to E. Banks having certified, that, for and during divers, to wit, thirteen years next before the making of the deed and policy, W. Beadle had been and was collector of poor rates for Barling and Dagenham aforesaid, having been duly appointed to the office of collector, and having, during all that time and until the making of the deed or policy, continued in the office, and during the said time W. Beadle had not according to his duty in that behalf, accounted for or paid divers monies, to wit, the amount of 800*l.*, which he had received during the time aforesaid by virtue of his office and was, by reason thereof, before and at the time of the making of the deed or policy, in default and arrear in respect of the monies so received by him, to wit, 800*l.* That the amount of the loss which E. Banks so certified

Willes appeared in support of the demurrer; but the Court called on

O'Malley (*Whitmore* with him) to support the plea.—The plea affords a good defence to so much of the declaration as it professes to answer. The plaintiffs' cause of action is founded on the auditor's certificate that there was a loss of 800*l.*, for which the defendants were responsible. But the inducement of the plea shews that part of the loss so certified arose from the default of the collector before the policy was granted, and for which, therefore, the defendants are not responsible. That amounts to an argumentative denial that the auditor certified a loss to the extent of 800*l.* by means of the premises mentioned in the declaration, and so the plea properly concludes with a special traverse to that effect. [*Alderson*, B.—The auditor's certificate is only evidence of the amount of damage. *Platt*, B.—Would the declaration have been good if it had stated that the defendants were indebted by reason of the certificate, without shewing any default on the part of the collector?] The plaintiffs have treated this as a covenant on the part of the defendants to pay whatever damage the auditor shall find that the plaintiffs have sustained; then, in order to shew that they rely on the certificate, and having thus rendered it material, the defendants are entitled to traverse it. [*Alderson*, B.—They can only traverse the fact of the making of the certificate. This plea attempts to put in issue the *amount* of loss which the defendants have agreed shall be proved by the certificate.] Upon the face of the declaration, it appears that there was a valid certificate to the extent of 800*l.*; the plea shews that there was not. Unless this statement be traversed, the plaintiffs at the trial might claim a verdict for 800*l.*, without offering any evidence of the amount of loss, on the ground that it was admitted on the record. [*Alderson*, B.—If the statement were

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struck out of the declaration, it would nevertheless good.]

Upon the suggestion of the Court, *O'Malley* elected amend, by withdrawing the plea.

Amendment accordingly

June 5.

FULLER and Others v. EARLE.

The defendant, a registered owner of shares in a Joint-stock Company, deposited the certificate with E. as a security for money advanced. The defendant afterwards borrowed a further sum from an insurance office, and executed to C., one of his sureties on that occasion, with the consent of E.,

IN this case, *Martin*, B., at Chambers, had made an *ordnisi*, under the 1 & 2 Vict. c. 110, s. 14, charging certain shares in a Joint-stock Company, called the "Professional Life Assurance Company," with the payment of a judgment debt due from the defendant to the plaintiffs. The matter came on for hearing before *Pollock*, C. B., in *Hilary* Vacation, when he directed a reference to the Master, who now made the following report:

The Professional Life Assurance Company is a Joint-stock Company, which was completely registered under the 7 & 8 Vict. c. 110, the shares being transferable pursuant to the Act and the deed of settlement. In *June* 1848, the defendant obtained from a Mr. Elderton,

the same time deposited by the defendant with Elderton as a security for the entire amount due to him, and they have remained in his custody ever since. In August, 1850, notice not to part with these shares was given by Elderton to the Company. In June, 1851 (for the purpose of paying part of his debt to Elderton), the defendant, through Elderton, negotiated a loan of 175*l.* from the "Age Life Assurance Company," in which, at the same time, he insured his life, and Elderton and Mr. Cockell, a director of the last-mentioned office, who was aware of the object of the loan, as sureties for the defendant, joined with him in a bond to the office, conditioned for the payment of the insurance premiums, and the repayment of the loan by instalments, and by which, in the event of any instalment not being paid, the whole amount was to become due. The defendant, at the same time, as an indemnity to Cockell, with the consent of Elderton, executed a transfer of the 200 shares in the Professional Life Assurance Company to Cockell, in the form prescribed by the 7 & 8 Vict. c. 110. He also signed a declaration to accompany the same, stating the terms of the transfer, and delivered them both to Cockell; it being also understood at the time, between Elderton and Cockell, that, should the latter ultimately sustain any loss, he should be indemnified by the former. Upon the second instalment under the bond becoming due in December last, it was not paid by the defendant; and Elderton and Cockell thereupon received a notice from the Age Office, claiming the whole amount of the bond from them. On the 4th of February last, Cockell lodged the transfer to him of the 200 shares at the office of the Professional Life Assurance Association, and requested the officer to transfer the shares into his name; which the officer refused to do, on the ground that he had been previously served with a copy of the order of *Martin, B.*, and had also received the notice from Mr. Elderton before mentioned. The shares are, there-

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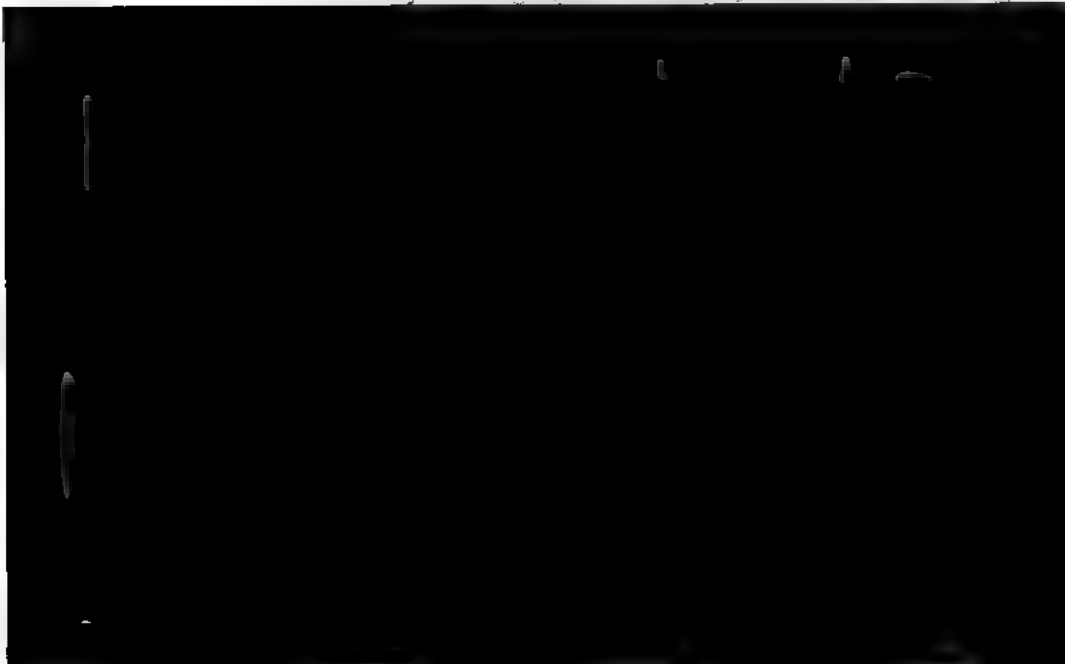
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fore, standing in the books of the Company in the name of the defendant.

Under these circumstances, if your Lordships should be of opinion that the shares were chargeable in these actions at any time before a transfer was made in the books of the Company, I do report that there were at the time of the making of the said order of *Martin, B.*, 200 shares, to which this said order could apply. But if your Lordships should not be of that opinion, then I do report that there were not, at the time of the making of the last-mentioned order, any shares to which the same could apply.

The Master's report having been read,

D. Keane, on behalf of *Cockell*, shewed cause against the order of *Martin, B. (a)*—The order ought to be discharged. The 1 & 2 Vict. c. 110, s. 14, empowers a Judge on the application of a judgment creditor, to charge with the payment of the amount of the judgment any stock or shares of the judgment debtor "standing in his name in his own right, or in the name of any person in trust for him. These shares were not, at the time the order was made, standing in the name of the defendant *in his own right*. Some light is thrown on the meaning of the expression by the language of the Stock Jobbing Act, 7 Geo. 2, c. 8.



to their use." That points to the distinction between the two cases: the words "in their own right" designating stock of which they are the absolute owners, and the words "in their name" referring to stock the real ownership of which is vested in some other person. The expression "in his own right" occurs again in the 88th section of the 1 & 2 Vict. c. 110, which provides for the case of an insolvent who refuses to transfer stock or property which cannot be taken in execution, and to which, after adjudication, he shall have become entitled "in his own right." But, in the 99th section, which prescribes the mode of proceeding, where, after the insolvent's discharge, any other person shall become possessed of the insolvent's property, the words used are "any property whatsoever belonging to such insolvent, or held in trust for him or for his use and benefit, or to which such insolvent shall be in any way entitled" Here the defendant has done all in his power to divest himself of the property in the shares; for he has executed a transfer to Cockell, and that assignment a Court of equity would enforce, even as against a subsequent purchaser for a valuable consideration and without notice: *Fortescue v. Barnett* (a). Moreover, the defendant has parted with the certificates, which, by the 52nd section of the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110, are *prima facie* evidence of title. The plaintiff will rely on the 54th section of the 7 & 8 Vict. c. 110, which requires certain formalities to be observed upon the transfer of shares; but those are for the protection of the Company, and a transferee cannot avoid his contract because they have not been performed: *Burnes v. Pennell* (b). The case of *The London and Brighton Railway Company v. Fairclough* (c) turned on the particular enactments of the statute incorporating the Company. The defendant's interest in the shares is similar to that of

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v.
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(a) 3 My. & K. 36. (b) 2 H. L. Cas. 497. (c) 2 M. & G. 674.

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a person who has created a trust in favour of himself and another, which is not the subject of an execution within the 29 Car. 2, c. 3, s. 10: *Doe d. Hull v. Greenhill* (a). In the event of the defendant's bankruptcy, these shares would not pass to his assignees, *Smith v. Smith* (b), or at all events they would only pass on the ground that he was the reputed and not the real owner of them: *Nelson v. The London Assurance Company* (c), *Ex parte Watkins* (d).

Bovill for Elderton.—The 14th section of the 1 & 2 Vict. c. 110, does not apply where the judgment debtor is not the beneficial owner of the property, but a mere trustee for some other person. Here there was a bonâ fide debt due from the defendant to Cockle and Elderton, who were in the situation of equitable mortgagees of the shares. The phrase “standing in his own name” means, having the sole right of ownership.

Montague Smith appeared for the plaintiffs, in support of the order; but was not called upon.

MARTIN, B.—The order for charging the shares must be absolute. The defendant's name appears on the register of shareholders as the holder of these shares. It was perfectly competent for him to have completed the transfer in the mode required by the 54th section of the 7 & 8 Vict. c.

ditor obtains a judgment, and seeks to charge the shares with the payment of that debt. In order to enforce that he must proceed in a Court of equity; and then, if the value of the shares is only sufficient to satisfy the judgment debt, the other creditors get nothing, but if there is any surplus they are entitled to it. This view is confirmed by the 14th section of the 1 & 2 Vict. c. 110, which enacts, that no disposition of stock or shares by a judgment debtor, after a conditional order has been obtained, shall be valid as against a judgment creditor. *Doe d. Hall v. Greenhill*, which has been referred to, has no application, for in that case there was a further trust to be performed with reference to the property taken in execution. The Stock Jobbing Act is very different from the statute in question, the object of the former being, that no person should sell stock unless he had dominion over it. Again, the cases as to reputed ownership under the Bankrupt Act have no bearing on the point, or, if they have, they are rather in favour of the plaintiff. Although the 88th and 89th sections of the 1 & 2 Vict. c. 110, use similar language to the 14th section, yet they use it in a very different sense. The order will therefore be absolute.

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Montague Smith applied for costs, on the authority of *Dempster v. The Earl of Glengall* (a).

Rule absolute, with costs.

(a) 4 Irish Jur. 20.

1852.

May 26.

HOLMES v. SIXSMITH.

A document, which purports to be an agreement, and is valid upon the face of it, but which is tendered in evidence to shew the transaction with which it is connected to be a fraud, is admissible, although unstamped.

The plaintiff entered into a written agreement with a third party to race their horses upon certain terms, and he deposited the amount of his stake with the defendant. The race was run, and the plaintiff's horse was beaten; but he afterwards discovered that the whole trans-

ASSUMPSIT for money had and received, and on account stated. Plea, non assumpsit, and issue there

At the trial, before *Cresswell, J.*, at the last *Live* Assizes, it appeared that the action was brought to recover the sum of 100*l.*, which had been deposited with the defendant as stakeholder, under the following circumstances.

The plaintiff, being the owner of a fast trotting horse named "Jackey," had inserted an advertisement in newspapers, in which he offered to run his horse against any other horse, upon certain terms. In pursuance of advertisement, a person of the name of Taylor offered to run a horse named "Flying Cloud," the property of a Williams, and which he represented to have never been formed in public, against "Jackey." The plaintiff accepted the challenge, and the terms of the race were embodied in a written agreement, and the sum of 100*l.* was deposited with the defendant as stakeholder. The race came off, and the plaintiff's horse was beaten; but it was afterwards discovered that "Flying Cloud" was a celebrated American horse, that his real name was the "Oneida Champion," and that his legs had been dyed to favour the decept

on which the race was to be run, and as a link in the chain of fraud:

“Liverpool, 12th Nov. 1851.

“Match for 100 sovereigns a side; Mr. Richard Holmes agrees to trot his Chestnut Cob ‘Jackey,’ under 14 hands, against Mr. John Williams’ Chestnut Horse ‘Flying Cloud,’ 15 hands 1 inch high, three miles on a road, on Tuesday, the 25th inst.; the road and time to be named by Messrs. J. Taylor and J. Ellis. Mr. Holmes’ driver is to weigh 9 stone 7 lbs. Mr. Williams’ horse to be either ridden or driven, and is to carry or draw, in addition to 9 stone 7 lbs., 7 lbs. for every inch his horse is above ‘Jackey’s’ height; in case of breaking, the horse or horses to be immediately pulled into trot. 30*l.* each to be now deposited, and the remainders to be made good on Monday the 24th inst., at Mr. Richard Holmes’ house (the ‘Tiger’ Vaults) between the hours of 7 and 8 in the evening. Either party failing to produce his money at the appointed time, to forfeit the amount deposited to the party who produces his full stakes. Mr. Samuel Brookes to be stakeholder.

R. W. HOLMES,

p. p. JOHN WILLIAMS,

W. TILSTON.”

This document was objected to on the part of the defendant, on the ground that it ought to have been stamped as an agreement. The learned Judge admitted it; and a verdict was found for the plaintiff, with leave to the defendant to move to set that verdict aside, and to enter a nonsuit.

Wilkins, Serjt., in last Term, obtained a rule nisi accordingly.

Knowles, *Edward James*, and *T. Jones*, now shewed cause.—The document was properly admitted in evidence, although unstamped; for it was offered for the purpose of

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defeating the transaction of which it formed an ingredient by shewing that it was altogether a fraud upon the plaintiff. The document, therefore, was not relied upon as an agreement, and as such binding upon the parties to within the true meaning of the Stamp Act, but for a purely collateral purpose. The plaintiff based his action upon the fraud practised upon him, and this paper was a link in the chain of proof by which the fraud was sought to be established. In *Coppock v. Bower* (a), an unstamped written agreement was offered in evidence for the purpose of insisting upon the illegality of the transaction in answer to an action for a sum of money agreed to be paid under it, and it was held to have been properly admitted. Lord Abinger, C. B., in his judgment, expounds the principles upon which the document, under such circumstances, cannot with propriety be excluded, where it is offered not for the purpose of setting it up and of establishing it, but in order to destroy it altogether. He says—"The object of both the statute and common law would be defeated, if a contract, void in itself, could not be impeached because the written evidence of it is unstamped, and therefore inadmissible. If that were so, a party entering into such an agreement might avoid the consequences of its illegality, by taking care that no stamp should be affixed to it," and in a subsequent part of his Lordship's judgment

no contract in law, and cannot be enforced between the parties. Now here the written papers were not obligatory between the parties, and they were put in evidence to shew what is called a void agreement, but which, under the circumstances, is no agreement at all." That decision governs the present case. If the plaintiff's horse had been successful in the race, and he had sought to recover the amount of the stakes by relying upon the agreement, the instrument could not have been given in evidence unstamped: for there the plaintiff would have endeavoured to enforce the transaction upon the validity of the agreement. *Reg. v. Gompertz (a)* is an additional and direct authority in favour of the admission of an unstamped document which is tendered with a view of impeaching a transaction. That was an indictment for a conspiracy to defraud the prosecutor, by inducing him to accept certain bills of exchange; and a warrant of attorney, which had been given to him to induce him to accept the bills, was held properly receivable in evidence, though unstamped. Lord *Denman*, C. J., after adverting to the injurious results that would follow from the rejection of such instruments, by protecting and encouraging frauds, proceeds to say, that "where the object of the evidence is not to enforce or set up the instrument as a valid instrument, but merely to shew that it was part of a scheme of fraud, and so to use it for a purpose *collateral* to the object apparent on the face of it, there are many cases in which it has been held that a written instrument, requiring a stamp but unstamped, is admissible. On the other hand, if there be any allegation to the proof of which an instrument available in law is necessary, or if it be tendered as such instrument, unless, as in forgery, it be itself the subject matter of the charge, then it cannot be received unstamped, if of a nature requiring a stamp. The

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(a) 9 Q. B. 824.

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distinction is well known, and it is needless to cite cases which establish it." *Sweeting v. Halse* (a) may be relied upon by the defendant; but that case is distinguishable from the present, for there, as *Tindal, C. J.*, said in *Smart v. Nokes* (b), the instrument was tendered "to prove an existing contract between the parties." *Kee v. Payne* (c) and *Enthoven v. Hoyle* (d) fully support the principle, that an instrument tendered to prove the transaction void by reason of fraud cannot be rejected for want of a stamp. In *Williams v. Gerry* (e), which at first sight appears adverse to the plaintiff's view, the rejected instrument was relied upon as valid; but the principle now contended for is fully admitted to be correct in the judgments delivered by the several members of the Court.

Wilkins, Serjt., and *J. Henderson*, in support of the plaintiff.—Where an instrument is capable of being enforced against any of the parties to it as an agreement, it cannot be given in evidence unless it is properly stamped. In some of the cases relied upon, the validity of the instrument itself was impeached. Upon that ground the decision in *Crook v. Bower* (f) proceeded. There the agreement was invalid upon the face of it. In *Reg. v. Gomperts*, the warrant of attorney was not binding, as it was given for an illegal purpose. The Stamp Act was passed with a view

Suppose the plaintiff had in the first instance relied upon the fact that his horse had won the race, but afterwards it turned out that the horse had been beaten, could he treat the transaction as fraudulent, and rest upon the instrument as invalid?] It is submitted that he could not. The parties ought not to be permitted at their option to treat an instrument as an agreement or as a nullity.

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POLLOCK, C. B.—We are all of opinion that this rule must be discharged. This case is, in reality, not distinguishable from that of *Reg. v. Gompertz* (a). The question there arose upon a warrant of attorney, which, on the face of it, was a good and valid instrument, and which, as such, required a stamp, but had not one. Here the question turns upon an agreement, which, as far as the instrument is concerned, is likewise legal; and the only ground for impeaching it is, that the plaintiff became a party to it by means of a gross fraud; and the question is, whether, where a party by fraud induces another to enter into a written agreement, it is necessary that the party imposed upon should have the instrument stamped, before he is in a position to demand his money on the ground of fraud. I entirely concur with the decision of the Court of Queen's Bench in *Reg. v. Gompertz*, and I think that an agreement does not require a stamp unless it is used *as and for an agreement*. If it is used merely as part of the machinery of a fraud, and to shew that the person paying money has been imposed upon, no stamp is necessary. In civil cases, if a document is used as an agreement, it must be stamped, but not so if it is used for any collateral purpose. If, for example, it be used as a piece of paper merely to identify some person by its having been found in his possession, or to connect one person with another, or to connect two pieces of paper together. And in criminal cases, although an

(a) 9 Q. B. 824.

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instrument might, as such, unquestionably require a stamp and be in itself free from fraud, still, if used to establish crime, it does not require a stamp: as where a prisoner is indicted for forgery, the forged instrument is receivable in evidence, though it has either no stamp or a wrong stamp. The learned counsel for the defendant have adverted to a bad use which they contended might be made of this state of the law. They said that, in the first instance, the plaintiff did not set up fraud, but insisted that the agreement was void altogether. The following case was also put by one of the members of the bench:—Suppose the plaintiff had claimed the stake under the agreement, and it turned out that his horse was beaten in the race, could he afterwards have set up and have relied upon the fraud? I think he could not; for, having once affirmed the contract by claiming the stake, he could not afterwards turn round and claim a return of his money on the ground of the agreement being void by reason of fraud. But each of the modes in which the plaintiff shaped his case was, in effect, the same, each being for the purpose of obtaining the same result, by shewing that the agreement was illegal, and therefore void; and each of these views of the case would fall within the principle, that the agreement did not require a stamp. In the first place, then, I think we have the true principle on this subject expounded

upon the race. In order to substantiate this case, the plaintiff tenders in evidence a piece of paper which purports to be an agreement to run his horse "Jackey" against another horse called "Flying Cloud," there being in truth no such horse as "Flying Cloud," and the whole being a mere trick to introduce into the race another horse of a totally different description, for the purpose of cheating the plaintiff. The production of the paper containing the agreement is a legitimate and the best mode of proving that fact. However, in so doing, the plaintiff does not set it up as an agreement, but as an ingredient in a concocted fraud. *Coppock v. Bower* in principle applies. The cases differ in this respect as to the facts, for there the paper appeared illegal on the face of it, whereas here the illegality appears by the evidence, which shews it to have formed a portion of a fraud. In both cases, however, the principle is the same; the document is not set up as a valid instrument, but its validity is destroyed by proof, either that it is illegal on the face of it, or that it is void by reason of fraud.

PLATT, B., concurred.

MARTIN, B.—I cannot distinguish this case from *Reg. v. Gompertz*. If that case did not exist, I should not have so clear an opinion on this subject as the rest of the Court. For when I find the law saying such and such documents must be stamped, and shall not be receivable in evidence unless they are stamped, it is the duty of parties to see that they are stamped; which the parties have not done here. But I think the matter is concluded by *Reg. v. Gompertz*.

Rule discharged.

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May 29. THOMTS and Another, Assignees of F. GODDARD, an Insolvent Debtor, v. HOBBS.

The 7 & 8 Vict. c. 96, s. 19, enacts, that if the petitioner shall, before or after the filing of his petition, in contemplation of his becoming insolvent, or, being in insolvent circumstances, voluntarily convey, assign, &c., any estate, real or personal, &c., to any creditor, &c., or to any person who is or may be liable as surety for such petitioner, every such conveyance, assignment, &c., shall be deemed fraudulent and void as against any assignee of the estate and effects of the

ASSUMPSIT.—The first count was for money had and received by the defendant to the use of the insolvent; and the second count was for money had and received to the use of the plaintiffs as assignees. Plea, non assumpsit and issue thereon.

At the trial, before *Wightman, J.*, at the last Berkshire Assizes, it appeared that the present action was brought to recover the produce of a bill of sale, under the following circumstances:—The insolvent Goddard had, in and prior to the year 1850, rented a large farm; and being in arrear to his landlord for rent, and being pressed for payment, and in insolvent circumstances, and unable to pay the arrears, he consented to give his landlord security for the amount. Immediately after the interview with his landlord, he proceeded to the defendant's house, some sixteen miles distant, and executed to him a bill of sale of his farming stock and household furniture. This took place on the 30th of April, 1850. The defendant, immediately upon the execution of this instrument, took possession of all Goddard's goods and chattels upon

in the County Court; and being unable to pay the amount of the debt, he petitioned the Insolvent Court for protection as an insolvent, in June 1851; his petition was filed in July, and the hearing came on in August. The insolvent himself was examined at the trial of the present action, and stated that he never thought of petitioning the court till a twelvemonth after the execution of the bill of sale.

On the part of the plaintiffs it was contended, that the assignment was fraudulent and void, within the 7 & 8 Vict. c. 96, s. 19 (a). The defendant contended that the conveyance was valid, as not having been made "with the view or intention" of petitioning the Court for protection from process.—The learned Judge asked the jury, first, "Was the bill of sale voluntary?" and thirdly, "Was the bill of sale by Goddard with the view or intention of petitioning the Insolvent Court for protection from process at any time when he might apprehend that proceedings would be or were taken against him?" The jury having

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(a) The 19th section enacts, "that if the petitioner shall, before or after the filing of his petition, in contemplation of his becoming insolvent or being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for or to or for the use, benefit, or advantage of any creditor or creditors, or to any person who is or may be liable as surety for such petitioner, every such conveyance, assignment, transfer, charge, delivery,

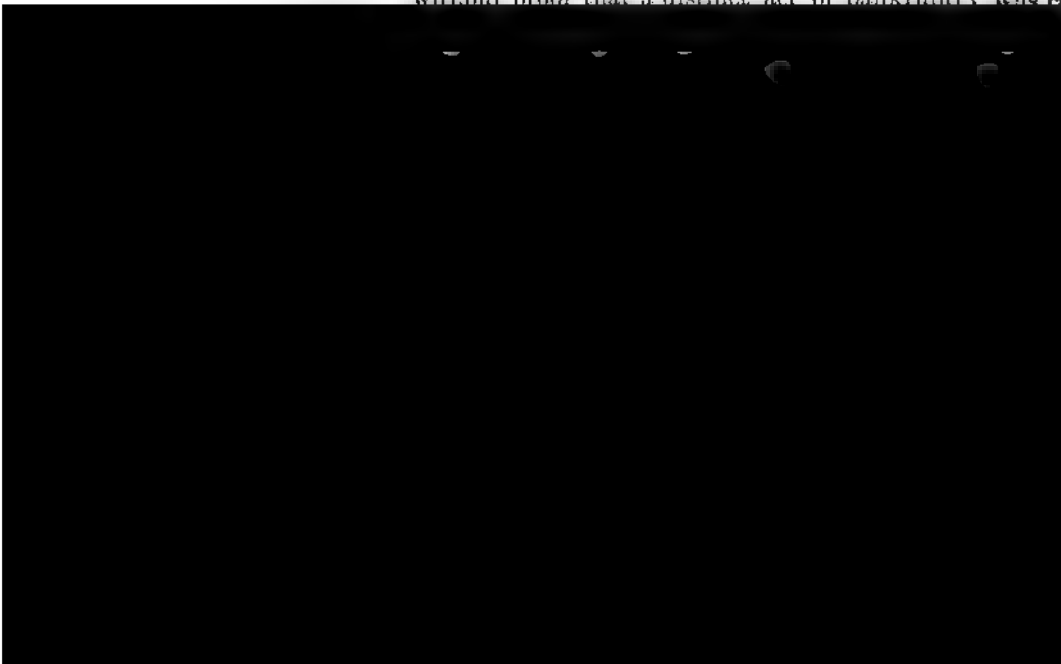
and making over, shall be deemed fraudulent and void, as against any assignee or assignees of the estate and effects of such petitioner appointed under the provisions of the said recited Act and of this Act, or of either of them: Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, if made at any time prior to three months before the filing of the petition, and not with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the Court for protection from process."

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answered both these questions in the affirmative, a verdict was found for the plaintiffs.

Keating, last Term, obtained a rule nisi for a new trial on the ground of misdirection: first, as to the direction as to the construction of the Act; and secondly, on the ground that there was no evidence that Goddard executed the assignment with the view or intention of petitioning the Insolvent Court for protection.

Alexander and Griffiths shewed cause.—First, it was contended on the part of the defendant that there was no evidence that the insolvent ever contemplated the effect of his petitioning the Insolvent Court for protection; there is ample evidence that such was his intention. It is for the jury to draw the inference from the facts as to the intention which a party has in his mind in a particular transaction. Here the insolvent, by the act of transferring his property, had left himself in a hopeless state of insolvency, which could lead to no other result than an application for protection. The statement of the insolvent might well be disbelieved by the jury. In *Aldred Constable (a)*, which may be cited as an analogous case, it was held that a fraudulent preference in contemplation of bankruptcy may be inferred by a jury from circumstances without proof that a distinct act of bankruptcy was committed.



said, that a person has necessarily an intention to do a particular act, which it may be impossible even to persuade him to do?] The jury were warranted in finding that fact from the circumstances of the present case.

Secondly, the direction was correct. Assuming the defendant's construction of the proviso to the 19th section to be the true one, the effect of the direction is, that the party must have the intention of petitioning the Court at the time he executes the transfer; but that the contingency may happen at any subsequent period. But it is submitted, that, as the first part of that section has relation to the insolvent's contemplating insolvency, the proviso is to be taken as having reference to insolvency also, the ultimate result of the particular proceeding being a petition for protection.—They also referred to *Gibson v. Boutts* (a).

Keating and *Pigott*, in support of the rule, were not called upon.

POLLOCK, C. B.—I am of opinion that the rule ought to be absolute, on the ground of misdirection. I do not think it necessary to give a decided opinion whether there was any evidence to warrant the jury in saying that the insolvent had the intention of petitioning the Insolvent Court. I think there was not. But I concur with the rest of the Court in making this rule absolute, on the ground that the question arising upon the proviso in the 19th section of the Act of Parliament has not been correctly presented to the jury. That proviso requires, in order to render void a conveyance made prior to three months before the filing of the petition, that the party making the conveyance &c. should have a *present* view or intention of petitioning the Insolvent Court. He must have in his mind at that time a definite intention to resort to that mode of liberating him-

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 v.
 НОВВЯ.

(a) 3 Scott, 229.

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THEOTTS
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HOBBS.

self from the difficulties which then press him, or wh
he distinctly foresees will compel him to adopt that ex
dient; but a mere *vague* and *general* intention at some
ture time of freeing himself from his embarrassments
that way is not sufficient.

PLATT, B.—I am of the same opinion. The transf
enumerated in the prior part of the 19th section are vo
unless they fall within the proviso, the concluding part
it. The only question therefore is, whether this bill
sale falls within that proviso. It was contended, that t
insolvent could have contemplated nothing less than :
solvency, since he was in insolvent circumstances; a
that he must of necessity have intended the consequen
of his own act; and that he was in the situation of a m
about to become bankrupt, whose conveyances and assig
ments are deemed to be made in contemplation of bar
ruptcy. There is, however, a distinction between the case
bankruptcy, where proceedings are taken hostilely again
the party, and the present case, where the party acts
luntarily and of his own accord. Here the act of petitio
ing the Court is the party's own act; he is not bound
petition, and he may never do so. The learned Judge
direction to the jury, that the question for their consid
ation was, whether the insolvent had the intention at a

strument was executed, Goddard was at liberty to transfer his property to any one person in preference to another, provided he did so in a valid and legal manner; and the question is, whether this common law right was taken away by the terms of this Act of Parliament. It is to be observed, that this Act, 7 & 8 Vict. c. 96, is not the general Insolvent Debtors Act, but it was passed for a different purpose. The 5 & 6 Vict. c. 116, enabled persons not being traders, or being traders owing less than 300*l.*, to present a petition to the Court of Bankruptcy. The Act of the 7 & 8 Vict. c. 96, was intended to extend and amend that Act. It enables a petition for protection from process to be presented to a Court of Bankruptcy; and then it enacts, in section 19, that if any petitioner shall, in contemplation of becoming insolvent, or being in insolvent circumstances, voluntarily convey his property to any creditor, such conveyance shall be deemed fraudulent and void as against his assignees, provided that no such conveyance shall be deemed fraudulent and void if made prior to three months before filing the petition, and not with the view or intention by the party conveying of petitioning the Court for protection from process. I am clearly of opinion, that, if a conveyance is executed more than three months before the filing of the petition, the party seeking to set aside that conveyance is bound to establish affirmatively that it was done with the view or intention of petitioning the Court for protection. It seems to me that the party in this case, when he executed the bill of sale, did not think about protecting himself from process, but that his only intention in doing so was to avoid the consequences of a distress. There is not a scintilla of evidence for the jury of the insolvent having the intention of petitioning the Court for protection from process. In my opinion, this Act of Parliament ought to be construed strictly, otherwise much injustice might be the consequence.

Rule absolute.

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June 1.

TAMBISCO v. PACIFICO.

The Court will not require security for costs to be given by a plaintiff, who is a foreigner and usually resident abroad, if at the time he is actually in this country.

THIS was a rule calling on the plaintiff to shew cause why he should not give security for costs. The affidavit upon which the rule was granted stated, that the plaintiff was a foreigner usually resident and now resided Athens, in Greece; and that the deponent was informed and believed, that the plaintiff came to this country, and remained here, for a temporary purpose only, and not with the intention of taking up his permanent abode in this country. The affidavit of the plaintiff in answer stated that he had come from Athens to this country for the press purpose of bringing this action against the defendant, and that he had resided in this country for the last four months, that he fully intended to bring the action to trial, in which he believed he should himself be a necessary witness, that it was his full intention to remain here until judgment had been obtained in the action, and that he was unable to give security for costs, in consequence of the loss he had sustained by reason of the refusal of the defendant to pay him the amount claimed in this action. The case had been heard before *Alderson, B.*, Chambers, and he referred the parties to the Court.

the same Court in an *Anonymous* case (a). In the more recent decision of this Court in *Dowling v. Harman* (b), the application was refused upon the authority of the two preceding cases; and *Parke*, B., said: "In the absence of any decision to the contrary, we must, for the sake of uniformity, adhere to the rule there laid down." *Key v. Gurney* (c), at first sight, seems to have a contrary aspect; but it does not appear from the report that the plaintiff was in this country at the time of the application. The only case which is opposed to the uniform current of authorities is that of *Oliva v. Johnson* (d). It was there said by the Court, that the affidavit in opposition to the rule ought to have stated, "that the plaintiff has been and is now a resident in this country, and that *he intends to continue here.*" But the question was very summarily disposed of, and neither of the cases in the Court of Common Pleas was referred to; and moreover, in *Dowling v. Harman* (b) no reference was made to *Oliva v. Johnson* (d). It is therefore submitted that, upon that part of the decision, the latter case cannot be supported.

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T. Jones, in support of the rule.—A plaintiff, who is a foreigner, and who is a mere visitor here, and has no intention of taking up his permanent residence in this country, ought to give security for costs, unless he sue in formâ pauperis. If the rule were otherwise, a plaintiff in such a condition would have the advantage of obtaining a judgment in his favour, without running any risk of having to pay costs in case of failure. The plaintiff's affidavit gives rise to this objection, for it states, that he intends to remain here until judgment is obtained in this action; and that is the principal answer he relies upon to a challenge that he is here for a mere temporary purpose. No doubt

(a) 8 Taunt. 737.

(c) 3 Dowl. 559.

(b) 6 M. & W. 131.

(d) 5 B. & Ald. 908.

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PACIFIC.

the authorities are not consistent: *Oliva v. Johnson* the defendant's favour; and in *Naylor v. Joseph (a)*, Court held that, if the plaintiff be not actually domiciled in England, he is bound to give the defendant security for costs.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. It was decided, as recently as the year 1840, by this Court, in the case of *Dowling v. Harman*, that where a plaintiff, who is a foreigner, is actually domiciled in this country, the Court will not impose upon him the obligation of giving security for costs. The rule is a reasonable one, which requires a foreigner, who comes here, by his action, and then leaves the country, to give security for costs, that the Court may be sure that, in case of a decision against him, the judgment may have some effect. The plaintiff states, that he came from Greece for the purpose of bringing this action, and that he is here now, that he fully intends to remain here until judgment is obtained in it. It has been urged, that the plaintiff's affidavit is not sufficient, and that the course of practice recommended by his counsel would lead to much inconvenience; however, I think that it is by far more convenient to add to the express decision of this Court in the case of *Dowling v. Harman*, which is in accordance with the cases in

until he shall have given security for costs. The plaintiff's affidavit does state that. It is suggested that he ought to go further, and to state that he intends to take up his permanent residence here; but such a statement would be of very little avail, for he might change his intention the moment judgment had been given. The fact of his being actually resident here is the true criterion by which the question is to be settled.

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PACIFICO.

PLATT, B.—I always thought that, by the rule which prevails in this Court, security for costs is not exacted of a plaintiff who is a foreigner, except he be out of the jurisdiction of the Court. But here he states that he is within it.

MARTIN, B.—I think that the true principle is to be found in the judgment of my Brother *Parke* in the case of *Dowling v. Harman*; and it is to be observed, that although he was engaged as counsel in the case of *Oliva v. Johnson*, he does not advert to it in his judgment in that of *Dowling v. Harman*.

Rule discharged, with costs.

1852.

May 29.

JOLLY v. HANDCOCK.

A deed, executed by a married woman, to pass real estate, and indorsed with a memorandum of acknowledgment before a Judge, &c., under the 84th section of the 3 & 4 Will. 4, c. 74, is not effectual, unless a certificate of that acknowledgment be filed of record in the Court of Common Pleas, as required by the 85th section.

ASSUMPSIT for money had and received, money paid, &c.—Plea, non assumpsit; and issue thereon.

At the trial, before *Wightman, J.*, at the last *St Michael's* Assizes, it appeared that the action was brought by plaintiff as purchaser, against the defendant as vendor of a certain real estate, for the recovery of the deposit money on the sale thereof. In the course of the cause, it became necessary for the defendant, in order to establish a good title to the property in question, to shew that the interest of one *Mary Handcock*, a married woman, had been cut off by a deed of mortgage executed by her. The deed was produced, and had indorsed thereon a memorandum of acknowledgment before Commissioners, as required by the 3 & 4 Will. 4, c. 74, s. 84. It was then objected on the part of the plaintiff, that this memorandum of indorsement was insufficient; and that it ought to be shewn that a certificate of that acknowledgment had been filed of record in the Court of Common Pleas under the 85th section.

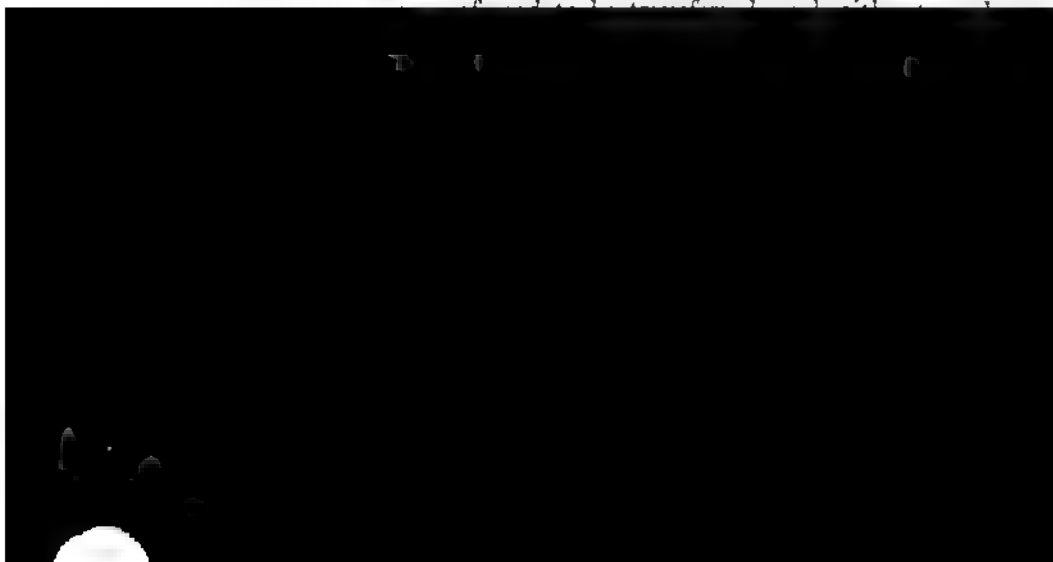
A verdict was found for the plaintiff for the amount claimed, with leave to the defendant to move to set aside the verdict, and to enter a verdict for him.

and recoveries, and the substitution of more simple modes of assurance." By section 77 a married woman may, with her husband's concurrence, by deed dispose of lands (with certain exceptions) as freely and effectually as she could do if she were a femme sole. By section 79, every deed executed under the Act (except in a specified case) must be acknowledged by her before a Judge of one of the Superior Courts, or a Master in Chancery, or two commissioners, &c. And by section 80, the Judge &c., before receiving such acknowledgment, must examine her apart from her husband. Section 81 provides for the due appointment of the commissioners. And by section 84, when the married woman acknowledges the deed, the person who takes the acknowledgment is required to sign a memorandum to the effect of the form there given, and also a certificate of the taking of such acknowledgment. And by section 85 it is enacted, that "every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some Judge, or Master in Chancery, or by two commissioners appointed pursuant to this Act, and duly verified by affidavit as aforesaid; and shall also see that it contains such statement of particulars as to the consent of the married woman, as shall from time to time be required in that behalf; and if all the requisites in this Act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas." Next follows the 86th section, which enacts, that "when the certificate of the acknowledgment of a deed

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by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards disposition, release, surrender, or extinguishment thereof made by any married woman, whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment." By section 88, "after the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer." By section 89, the Lord Chancellor of the Court of Common Pleas is to appoint an officer with whom the certificates shall be lodged; and the Court is to make orders touching the examination, memorandums, certificates, affidavits, and various other matters. It is clear, from the language of the Act, that a mere memorandum, without the certificate having been duly enrolled, is not sufficient to bar the right of a married woman; for, until that be done, the execution of the conveyance is an inchoate and ineffectual act. If a title



to file the certificate. The object of the statute is also to enable persons by search to ascertain whether the acknowledgment has been made. Certain rules were framed by the Chief Justice of the Court of Common Pleas under the powers given for that purpose by the 89th section; by one of which it is ordered, "that the certificate and affidavits verifying the same shall, within one month from the making of the acknowledgment, be delivered to the proper officer appointed under the said Act, and that the officer shall not after that time receive the same without the direction of the Court or a Judge;" and it goes on to provide for the fees to be paid "to the Judges, Masters, and commissioners for taking acknowledgments of married women, and the clerk of the peace or his deputy for examining the certificate and affidavit, and filing and annexing the same." The practice of conveyancers is in favour of the plaintiff's position: 2 Hayes on Conveyancing, 5th edit., p. 240, n.; 1 Stephen's Comm. 442.

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Alexander and Pigott in support of the rule.—This statute is very carefully worded, and does not contain any express enactment which declares that the filing of the certificate shall be essential to the transfer. The several provisions which relate to the filing of the certificate are not imperative, but merely directory. The 77th section requires the deed to be acknowledged by the married woman as thereafter directed. That has reference to the 79th section. And the 80th section expressly renders the deed void if not acknowledged; but there is no enactment by which the instrument of transfer is said to be void where the certificate shall not be filed. The 86th section gives to the filing of the certificate the relation to the acknowledgment, as being *the* act which makes the transfer valid. The practice of conveyancers has been adopted from motives of caution. The deed here was therefore valid.

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POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. It appears to me that the 3 & 4 Will. c. 74, renders it essential that this document should not only be acknowledged by the married woman, as directed by the Act, but also that a certificate of the acknowledgment should be filed of record, before any use can be made of the document; and I think that a perusal of these clauses cannot lead to any other conclusion. It has, indeed, been contended, that although, in some of the clauses of the statute, it is expressly enacted that the deed shall be void unless certain matters are complied with, it is nowhere expressly declared, and not even in those clauses which require the certificate to be filed, that the deed shall be void if that form be not observed. But the 86th section says, that “when the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation back to such acknowledgment.” It can hardly be contended that, by this language, the transfer is to be considered as complete and valid by virtue of the acknowledgment alone, and before the certificate is filed. The obvious meaning of the clause is this,—the certificate when filed is to have relation back to the date of the ac-

to transfer their rights to property, the necessity of being subject to an examination by a commissioner or other properly appointed officer, that it may be ascertained whether the transfer they are about to make is a voluntary one, and is not made by compulsion of the husband. This law is for their protection, by affording them due caution, lest they should do that which may be injurious to their rights. Prior to this statute, the examination was conducted by the Judges of the Court of Common Pleas, and the whole proceeding appeared of record. But this statute has merely introduced another mode of doing the same thing. After the execution of the deed, the married woman is in the next place examined by the commissioner or Judge apart from her husband, to ascertain whether she be under any improper control, or whether that which she is about to do is her own voluntary act. It is, moreover, the duty of the examining officer to describe to her the nature of the transaction, by pointing out what it is with which she is about to part. Now, some cases have occurred, where the woman, upon such an explanation being afforded her, has resolutely refused to part with her right and interest in the property. This is a proof of the importance and necessity of such an examination. The next step is for the party before whom she goes to certify the fact that the execution of the deed was voluntary on her part. The certificate is then to be filed. This having been done, the entire proceeding is as public a one as it was before the statute; the whole object of the statute being to substitute a new mode of carrying out what the law had required before, and provision being also made that the act of disposition by the married woman shall be of an equally public character. The statute then enacts, that, after this examination is over, the acknowledgment is to be made, and the certificate of acknowledgment signed, and it goes on to say,—“When the certificate shall be so filed of record” but not till then—“the deed so acknowledged shall take

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effect from the time of its being acknowledged." The tificate is to take effect by relating back to the date of acknowledgment, the reason for that being that the d may have relation to that date, and not to the date of execution.

MARTIN, B.—A reference to the state of the common as it was before this statute passed will assist us in ar ing at its true construction. There can be no doubt t before the statute, a married woman was not in a situat to transfer real property without being a party to a cord; and accordingly, the transfer used to be effected means of a fine. The object of this statute was to acc plish the same end by substituting an analogous proce ing in lieu of the inconvenient process by way of f The 77th section enacts, that the disposition thus m by the married woman shall have the same effect as if were a femme sole, "save and except that no such disp tion, release, &c. shall be valid and effectnal, unless husband concur in the deed by which the same shall effected, nor unless the deed be acknowledged by h The defendant's counsel would draw from thence the ference, that, provided these things be done, the deed s be valid; but, by reference to other parts of the stati it will be seen that this is not the case. It is true t

This also appears from the concluding portion of the 89th section, which enacts, that the Lord Chief Justice of the Common Pleas shall regulate the fees "to be paid for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by this Act to be had, done, and executed, for completing and giving effect to such acknowledgment and examination." The legislature, therefore, clearly intended something to be done to complete this act of the married woman, namely, by having this certificate signed by the Judge or commissioner, and then inrolled of record. When that has been done, the wife is considered in point of law to have done that which otherwise is not binding. I may add, that this rule was not granted from any serious doubts that the Court entertained at the time of the motion, but because the point was much pressed, and one of the members of the Court observed that the question was one of some importance, and had never as yet come before the Courts.

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Rule discharged.

FREGGARD v. BARNES and BARTON.

June 1 & 3.

TRESPASS for breaking and entering the plaintiff's house, and for assaulting and imprisoning him.

Plea, not guilty "by statute;" and issue thereon.

At the trial, before *Talfourd*, J., at the last Wiltshire Assizes, the following facts appeared:—The plaintiff and the defendant Barnes resided at Dauntsey, in Wiltshire, and the defendant Barton was a county police constable appointed under the 2 & 3 Vict. c. 93, s. 8, and was attached to the district in which Dauntsey was situate. Barnes,

A. B. obtained a magistrate's warrant for the apprehension of C. D. upon a criminal charge, which, on the hearing, was dismissed. This warrant was directed "To the constable of D." (a parish in the county of W.) A. B. delivered the

warrant to a *county constable* of W., and directed him to execute it, which he did:—*Held*, that the warrant could not be executed by any other constable than by a constable of the parish of D., and consequently that the execution of it by the county constable was illegal.

Secondly, that *trespass* lay against A. B.

Thirdly, the action not having been brought within six months after the commission of the trespass, that the constable was protected under the 6th and 8th sections of the 24 Geo. 2, c. 44.

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having lost some lamps, and entertaining suspicions against the plaintiff, proceeded to a magistrate, and obtained warrant to search the plaintiff's premises, and to apprehend him. This warrant was headed "Wilts, (to wit, and was directed "*To the constable of Dauntsey.*" Barnes delivered the warrant to Barton, and directed him to execute it. Barton thereupon went to the plaintiff's house and having obtained the lost lamps from the plaintiff's wife, was told by Barnes to do his duty. He accordingly arrested the plaintiff, and carried him before the magistrate by whom the warrant was granted; but, after hearing the case, he dismissed the charge. This took place in the early part of July, 1851; but this action was not commenced until the latter end of January, 1852, being more than six months after the committing of the acts of trespass. It further appeared, that a constable had been duly appointed to the parish of Dauntsey.

The defendants justified under the 21 Jac. 1, c. 12, 12 Will. 4, c. 41, 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 81 and contended, first, that they were *both* justified under the warrant; and, secondly, on the part of Barnes, that as against him, the form of action was misconceived, as it ought to have been case and not trespass; and thirdly, as respected Barton, that the action ought to have been brought within the period of six months as required by

and who was also attached to that district, although it was not executed by *the* constable of that parish. Under the 2 & 3 Vict. c. 93, s. 8, the defendant Barton had all the powers of executing warrants in that parish by virtue of his authority which extended through the county. It is therefore submitted, that it was not essential to the validity of the warrant that it should be executed by the parish constable. Where two or more constables are appointed to a parish, a question might arise by whom the warrant could be executed.

Secondly, with respect to Barnes, *trespass* does not lie against him, as he merely set the law in motion. The plaintiff's proper remedy, if any, was by an action on the case. In *West v. Smallwood* (a), it was held, that where a party lays a complaint before a magistrate on a subject-matter over which he has a general jurisdiction, and the magistrate grants a warrant, upon which the party charged is arrested, the party laying the complaint is not liable as a trespasser, although the particular case be one in which the magistrate had no authority to act. And in *Brown v. Chapman* (b) it was held, that where a party sets the law in motion, even where there is want of jurisdiction on the part of the magistrate, the former is not liable as a trespasser. *Elsee v. Smith* (c) and *Barker v. Rollinson* (d) are to the like effect. Here the defendant Barnes merely handed over the warrant to the constable, with directions to execute it; but he did not take any part in the arrest itself. He was not present when the act of trespass was committed. [*Martin*, B.—The defendant Barnes directed Barton to arrest the plaintiff, and at the same time delivered to him what professed to be a warrant; now, if that turns out to be a mere piece of waste paper, the defendant Barnes is a trespasser, for the trespass is committed by his direc-

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 v.
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(a) 3 M. & W. 418.

(b) 6 C. B. 365.

(c) 1 Dowl. & Ry. 97.

(d) 1 C. & M. 330.

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tions. *Alderson, B.*—Suppose A. B. directs his servant to arrest C. D., and his servant does so, and there is no justification for the arrest, A. B. is a trespasser. There hardly be a doubt upon this point.]

Kinglake, Serjt. (F. Edwards with him) was stopped by the Court upon the question as to the form of the act—First, the warrant, being directed to the constable Dauntsey, and to no other person, could not legally be executed by a county constable. The office of parish constable is distinct from that of a county constable; and duties of each, and their appointment, have been frequently the subjects of distinct legislative enactments. In the year 1823 the rule was held to be plain that, "where a warrant is directed to any one by name, he may execute it wherever within the jurisdiction of the magistrates; where it is directed by the description of an office, then the officer cannot act beyond the precincts of his office."

Best, J., in *Rex v. Weir(a)*. In the following year the Legislature passed an Act, the 5 Geo. 4, c. 18, for the purpose (inter alia) of "facilitating the execution of warrants by constables;" and by section 6, which, after reciting "that warrants addressed to constables, headboroughs, or other peace-officers of such respective parishes, &c., could not be lawfully executed by them out of the precincts of their respective parishes," it was enacted that it should be lawful for any constable, headborough, or other peace-officer of any parish, to execute any warrant directed to him, in any part of the county in which he is appointed to serve, notwithstanding that it may be directed to him as a constable, headborough, or other peace-officer of a particular parish.

qualification &c. of these officers. It therefore follows from a reference to these Acts, that the offices of parish and county constables are distinct, and that the powers of a parish constable in the execution of these warrants may be coextensive with the powers intrusted to county constables. But the defendants contend that, under the 2 & 3 Vict. c. 93, s. 8, a county constable is empowered to execute warrants in any part of that county in which he is appointed to act; and that, under the 3 & 4 Vict. c. 88, s. 27, by which justices of the peace are empowered to appoint constables to particular districts consisting of parishes, the defendant Barton was authorised to act in this parish. And the defendants further rely upon the 11 & 12 Vict. c. 42, s. 10, which enacts that every warrant "may be directed either to any constable or other person by name, or generally to the constable of the parish or other district within which the same is to be executed, without naming him, or to such constable and all other constables or peace-officers in the county or other district within which the justice or justices issuing such warrant has or have jurisdiction, or generally to all the constables or peace-officers within such last-mentioned county or district." But the defendants have not obeyed the requirements of that section, which was passed with the intention of affording protection to persons using ordinary care; for the warrant here is directed to a specific officer, but was delivered to another person, and was executed by him.

Secondly, the defendant Barton is not within the protection of the 6th and 8th sections of the 24 Geo. 2, c. 44. The arrest here was not made "in obedience to the warrant," inasmuch as the warrant did not justify the act. The defendants are in the situation of a person acting without a warrant. Where a warrant commands the officer to take the goods of A., and he takes those of B.

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v.
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by mistake, the Act applies: *Parton v. Williams(a)*.
was then stopped by the Court.

ALDERSON, B.—I think that, in this case, if my brother *Kinglake* will give up that part of the rule which is against Barton, the constable, the rule ought to be absolute against the defendant Barnes. The parties ought to have followed the direction of the warrant, which requires that it should be executed by the parish constable. But I think it is clear that the constable comes within the protection of the 6th and 8th sections of the 24 Geo. 2, c. 44, by which the action must be brought against a constable within six months after the alleged trespass, where he intends to act under the warrant, and does not use it colourably.

PLATT, B., concurred.

MARTIN, B.—I think the 11 & 12 Vict. c. 42, s. 1, leaves no doubt upon the point as to the execution of the warrant. The party to execute it was the parish constable of Dauntsey. This the defendant Barton was aware of. But still I think he is entitled to the protection of the 6th and 8th sections of the 24 Geo. 2, c. 44, ss. 6 & 8.

Rule absolute accordingly.

1852.

GRINHAM and Others v. CARD and Others.

May 22.

HONYMAN had obtained a rule, calling on the plaintiffs in a plaint of *Grinham and Another v. Card and Another*, trustees of the "Frant Friendly Society," and the Judge of the County Court of Kent, to shew cause why a writ of prohibition should not issue to him to stay all further proceedings in the said plaint.

It appeared from the affidavits, that the plaintiffs were two of the members of the committee of the Frant Friendly Society, and that the defendants were the trustees of that body. The particulars of the plaintiffs' demand in the said plaint were as follows:—"For you to shew cause why you do not pay over the money or reserved fund of the Frant Friendly Society, in your hands or power, as trustees of the said society, as required and prescribed by a rule of the said society, duly made and passed by the said society, and certified on the 10th of July, 1850." It further appeared, that the society was originally established in 1836, when, among other rules for its governance, the 32nd rule, which was duly enrolled and certified by John Tidd Pratt, Esq., was as follows:—"That if any difference or dispute shall arise between any of the members of this society, not being officers, touching any matter or thing relating to this society, it shall be referred to the committee for their decision; but if any dispute or difference shall arise between any officers of this society, or between any other

By the 22nd section of the Friendly Societies Act, 13 & 14 Vict. c. 115, any dispute arising between the members of any friendly society and the trustees, treasurer, or other officer, or committee thereof, shall be settled in such manner as the rules of such society shall direct, and the decision so made shall be binding and conclusive; but if such dispute shall be of such a kind, that, for the settlement of it, according to the laws in force, recourse must be had to a Court of equity, it may be referred, at the option of either party, to the judge of the county court.

Where, by the rules of a friendly society, disputes between members and the trustees may be referred

to the arbitration of a certain number of the committee, a dispute, which affects the interests of all the individual members of the society, arising between some of its members, who are also members of the committee, and the trustees, where the question is not one which necessarily requires that recourse should be had to a Court of equity, such dispute cannot be referred to the judge of the county court, but must be referred to other members of the committee.

Where a dispute arose between two of the members of the committee of a friendly society and the trustees, touching the distribution of a fund in the hands of the latter; and by one of the rules of the society, it was ordered that disputes were to be referred to such members of the committee as should not be personally interested in the matter:—*Held*, that the judge of the county court had no jurisdiction in such case, and the Court granted a prohibition against further proceedings in a plaint issued out of the court over which he presided.

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member and any officer or officers, it shall be first referred to the committee, or such of them as shall not be personally interested therein; and if the decision of committee shall not be satisfactory to all parties concerned, then reference shall be made to arbitrators, pursuant to the 10 Geo. 4, c. 56, s. 27." The "reserved fund" not established until the year 1839, and it consists of the accumulated subscriptions of the honorary members, and its application was regulated by a rule (No. 38), which was framed in that year. In 1847 this rule was altered, and the application of the reserved fund was also altered, and the payments were directed to be made pursuant to a certain scale. This rule provided, "that if any difference or dispute shall arise touching this fund or the construction of this rule, the same shall be referred to arbitration in the manner specified by the rule of this society." On the 10th of July, 1850, this rule was also expunged, and the following rule was made and duly certified by the Tidd Pratt. This rule, after directing that rule 38 be expunged, proceeded as follows:—"And that the monies now in the Bank in the names of the trustees, and monies that shall or may be due to the reserved fund to the time of this alteration coming into operation, be divided to the members according to the years they have been members since the formation of the bank."

to the vote at the meeting, and was negatived; and that, in consequence thereof, the trustees refused to distribute the fund lest they might be held responsible for so doing. It was contended before the Judge of the County Court, on the part of the defendants, that he had no jurisdiction in the case; but that, under the 13 & 14 Vict. c. 115, s. 22 (a), and the 32nd rule of the society, which rule expressly referred to the 10 Geo. 4, c. 56, s. 27 (b), the plaintiffs ought to have referred the question to the arbitration of the committee. The judge, however, was of opinion, that the rule of the 10th of July, which had been duly certified, gave him jurisdiction over the plaint, and he accordingly gave judgment in favour of the plaintiffs; whereupon the present rule was obtained.

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Hawkins shewed cause.—It will be contended, on the

(a) The 22nd section enacts, "That if any dispute shall arise between the members or persons claiming under or on account of any member of any society or branch established under this Act, and the trustees, treasurer, or other officer or committee thereof, it shall be settled in such manner as the rules of such society or branch shall direct; and the decision so made shall be binding and conclusive; but if such dispute be of such kind, that, for the settlement of it, according to the laws now in force, recourse must be had to one of her Majesty's Courts of equity, or to the Court of Session, it may be referred, at the option of either party, to the judge of the county court &c."

(b) That section enacts, that "provision shall be made by one

or more of the rules of every such society, to be confirmed as required by this Act, specifying whether a reference of every matter in dispute between any such society or any person acting under them, and any individual member thereof or person claiming on account of any member, shall be made to such of his Majesty's justices of the peace as may act in and for the county in which such society may be formed, or to arbitrators to be appointed in manner hereinafter directed; and if the matter so in dispute shall be referred to arbitration, certain arbitrators shall be named and elected at the first meeting of such society or general committee thereof that shall be held after the enrolment of its rules."

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part of the defendants, that, under the 22nd section of 15 & 16 Vict. c. 115, which is an Act to "amend the law relating to Friendly Societies," the question here in dispute was one over which the Judge of a County Court had no jurisdiction; but that the proper mode of settling the dispute was by reference to the committee of the society. Now, the 1st section of the 13 & 14 Vict. c. 11 repeals the 10 Geo. 4, c. 56, under which the society was enrolled; and the 46th section enacts, that "every society duly enrolled or certified under any Act hereby repealed which shall not after the passing of this Act assure payment to or on the death of any member, or on any contingency, or for any purpose for which the payment of money may be assured under this Act exceeding 100*l.*, or annuity exceeding 30*l.* per annum, or any sum in sickness exceeding 20*s.* per week, shall enjoy all the exemptions and privileges in this Act conferred upon any society established under the provisions of this Act." It will be seen that, although the former Act under which this society was enrolled has been repealed, the recent statute is applicable; and therefore, that, under the 22nd section of the 13 & 14 Vict. c. 115, this is such a dispute as is required to be settled "in such manner as the rules of the society shall direct." But the 38th rule, which directs matters in dispute between members of the society to

members of any society established under the Act, and the trustees, treasurer, or committee thereof, shall be settled in such manner as the rules of such society shall direct; that means, all such rules as are or may be made; and then the section goes on to say that, if the dispute be of such a character that recourse must be had to a Court of equity, the dispute is to be referred to a judge of a county court. The section, therefore, gives a general power of settling disputes between the members and the trustees, where the matter in dispute does not require the intervention of a Court of equity. This matter clearly is not of such a character.] It could hardly be intended that the committee ought to be entrusted with the power of referring disputes in which they are interested to themselves. The plaintiffs could not sustain an action at law. [*Alderson*, B.—This is not a case in which the parties *must* have had recourse to a Court of equity, and therefore they ought to refer it to arbitration. It is not a dispute between the members of the committee and the trustees, but between two of the members of the society as members merely, and the trustees. The investigation could not be made without affecting each of the members; the plaintiffs, therefore, are not interested in the question as committee-men, but as members. The dispute might be referred to some of the other members of the committee under the 32nd rule, so as to exclude the plaintiffs.]

PER CURIAM (a).—The rule must be absolute,

(a) (a) *Pollock*, C. B., *Alderson*, B., *Platt*, B., and *Martin*, B.

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June 1.

WARD v. WARD.

An immemorial right of way is not lost by non-user for upwards of twenty years, the user having been discontinued merely by reason of the party's having had a more convenient way.

TRESPASS for breaking and entering two closes of plaintiff, with horses, carts, &c.

The defendant pleaded, first, not guilty. Secondly, that he was seized of a close called the Stubbing and he then prescribed for an immemorial right of way over the closes in question to and from the Stubbing Pits, and for the occupation thereof. Thirdly and fourthly, forty and twenty years' user respectively of such right of way, under the Prescription Act, 2 & 3 Will. 4, c. 71. The plaintiff joined issue on the first plea, and traversed the rights respectively set up in the other pleas; and he was then assigned for trespasses committed extra viam, which new assignment the defendant pleaded not guilty to, and issue was joined thereon.

At the trial, before *Jervis, C. J.*, at the last Derby Assizes, it appeared that the defendant was the owner of the close called the Stubbing Pits, and that in former times the owners of that close were entitled to use the disputed way in question; but that, in fact, the user had not been exercised from the year 1814 up to the time of the alleged trespasses. During

acknowledgment for the use of the way over his own land. Under these circumstances, a verdict was entered for the plaintiff, with 40s. damages, with leave to the defendant to move to enter a verdict for him upon the issue raised by the second plea.

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A rule nisi having been obtained accordingly,

Hayes (with whom was *Deighton*) shewed cause.—The disuse of the right of way for upwards of twenty years amounts to an abandonment of the right. The defendant has therefore lost the right of way which originally belonged to the Stubbing Pits. This is a right which may be presumed from a continued user, and by non-user the right may be presumed to have been given up: *Moore v. Rawson* (a). *Littledale*, J., there says, “After twenty years’ adverse enjoyment the law presumes a grant made before the user commenced, by some person who had power to grant. But if the party who has acquired the right by grant, ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right.” [*Alderson*, B.—The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user. Here the owners of the Stubbing Pits did not use the way in question, for the simple reason that they had a more easy and convenient means of access to that part of their property. If the owner of that close were now precluded from recovering the original right, he would be without the means of any access to his property. *Pollock*, C. B.—It is a question of fact, and one which could only be found one way. The only infer-

(a) 3 B. & C. 332.

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ence that could reasonably be drawn from the ~~mon~~
by this party is, that he had no occasion for it.]

Macaulay and *Brewer*, in support of the rule, were
called upon.

PER CURIAM (a).—The rule must be absolute.

Rule absolute

(a) *Follock*, C. B., *Alderson*, B., *Platt*, B., and *Martin*, B.

June 10.

ROSKRUGE v. CADDY and MAYNE.

An avowry for
rent stated, that
the plaintiff
held the pre-
mises of the de-
fendant at a
certain rent, to
wit, the yearly
rent of 80*l.*;
and because a
large sum, to
wit, the sum of
80*l.* of the rent
aforesaid for
a certain time,
to wit, one year
expired, on the

REPLEVIN.—Avowry and cognisance, for that
plaintiff, for a long time, to wit, for all the time during
which the rent hereinafter mentioned to be distrained
was accruing due, and from thence until and at the
time when &c., held and enjoyed the said close, in w
&c., with the appurtenances, as tenant thereof to the
J. Caddy, by virtue of a certain demise thereof thereto
made, on and under a certain rent, to wit, the yearly
of 80*l.*; and because a large sum, to wit, the sum of
of the rent aforesaid, for a certain time, to wit, one

At the trial, before *Erle*, J., at the last Cornwall Assizes, it appeared that, on the 24th of September, 1849, the plaintiff and the defendant Caddy entered into an agreement, not under seal, whereby the plaintiff agreed to take, and the defendant to let, a certain farm "for the term of seven years, from the 29th of September instant, paying for the first year at the rate of 80*l.*; the following years to be dependent on the rise or fall of the price of corn." In the course of the first year some payments were made on account of the rent of 80*l.*; but 28*l.* remained unpaid. In August, 1851, the defendant Caddy distrained for 88*l.*, as rent due up to Midsummer in that year, whereas, in fact, there was no part of the second year's rent due, the rent being payable yearly. Under this distress, beasts of the plough were improperly taken for the rent actually due, and the distress was abandoned as to the residue. Subsequent proceedings were taken in the County Court for the illegal distress, and in the result it appeared that the 28*l.* so in arrear was still unpaid, and capable of being again distrained for. On the 30th of September, 1851, the defendant distrained again for 80*l.*, as rent due for the second year, and this distress was replevied. There was no evidence of the rent having been fixed by reference to the price of corn, or otherwise, for the second year. Upon these facts, it was objected that the avowry was not sustained, as the tenancy set up was a yearly tenancy at the fixed sum of 80*l.* a year; whereas the agreement (although it was void as a lease for seven years, because not under seal) shewed that the rent for the second year was to be dependent upon the price of corn. The learned Judge held this to be the true effect of the agreement. It was then contended on behalf of the defendants, that, inasmuch as there was a portion of the first year's rent in arrear, the distress could be supported, and that the amount specified in the avowry and cognisance was immaterial. A verdict was taken for the defendants,

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with leave to the plaintiff to move to enter the verdict for him, with four guineas damages.

A rule nisi was accordingly obtained in last Term.

Collier and Maynard shewed cause.—The statement of the avowry, that a certain amount of rent was due for the year ending on the 29th of September, 1851, is not a material allegation, and moreover, it is under a *videlicet*. The legal effect of the pleading is, that rent was due in respect of the tenancy at the time the distress was made. A plea in bar of *riens in arrear* denies that any rent was then due. The avowry is therefore supported by proof of rent being due either for the year 1851 or for the preceding year. In *Forty v. Imber(a)*, Lord *Ellenborough*, C. says, "It is unnecessary to revert to cases before the statute of the 11 Geo. 2, c. 19, s. 22, which meant to relieve landlords from the difficulties which they before laboured under in making avowries for rent, and gives the avowry and cognisance in as general terms as possible. And there has been no case since that statute, where, if it turned out that less rent was due than the defendant had avowed, he has not been holden to be entitled to recover for so much as was due: it is the constant practice." In 1 *Clark on Pleading*, 7th edit., p. 273, the cases are collected on the rule which requires some time to be laid in

material. There are cases which shew that, if a distress has been made for rent not due, and the defendant obtains judgment upon his avowry, error will lie (a).

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PLATT, B.—I am of the same opinion. It is also clear that the defendant did not intend to distrain for this 28/.

MARTIN, B., concurred.

Rule absolute.

(a) See *Richards v. Cornforth*, 2 Salk. 580.

CANNAN and Two Others, Assignees of J. NASH, a Bankrupt, v. THE SOUTH EASTERN RAILWAY COMPANY (a).

THIS was an action of trover by the plaintiffs, as assignees of John Nash, a bankrupt, for the value of certain timber trees alleged to belong to the bankrupt's estate, and to have been converted by the defendants after the bankruptcy. The declaration alleged a possession of the timber by the plaintiffs as assignees.

A bankrupt, before the act of bankruptcy, deposited certain timber trees with the defendants, to be kept by them upon their wharf, and to be delivered

upon payment of wharfage fees. On the 7th of February, 1848, a fiat in bankruptcy issued against the bankrupt, and he was duly adjudged a bankrupt. On the 9th of February, 1848, the official assignee was appointed. In February 1849, the creditors' assignees were appointed. After the appointment of the official assignee, and before the appointment of the creditors' assignees, and without having obtained the consent of the former, the bankrupt sold the timber, and ordered the defendants to deliver it to the purchasers; and the defendants, who had no notice of the act of bankruptcy, or of the fiat, or of the adjudication, immediately upon the receipt of the order delivered the timber to the purchasers. The adjudication was not notified in the Gazette until the 13th of February, 1849:—*Held*, first, that the issuing of the fiat was not of itself notice of the act of bankruptcy; and secondly, that, by the words in the 84th section of the 6 Geo. 4, c. 16, "goods belonging to any bankrupt," are to be understood goods which belonged to the bankrupt at the time they were deposited in the possession or custody of the person or body corporate delivering them, and which goods would have continued to be his property, if an act of bankruptcy had not occurred; and therefore that the defendants were protected by that section, as they had delivered the goods without notice of the act of bankruptcy.

The declaration stated that the creditors' assignees were possessed of the goods at the time of the alleged conversion:—*Quære*, whether such allegation was supported by evidence, which shewed that, at that time, the creditors' assignees had not been appointed.

(a) This case was decided in Easter Term (May 7).

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The defendants pleaded, first, not guilty; and, second, that the plaintiffs were not possessed as assignees: which issue was joined.

By consent and by a Judge's order, the following was stated for the opinion of the Court:—

The defendants were owners of a wharf at Strood, Rochester; and the bankrupt Nash, before the date of the fiat against him, deposited the timber in question upon defendants' wharf there, to be kept by them, and to be delivered by them on payment of wharfage for the same. On the 7th of February, 1848, a fiat in bankruptcy duly issued against Nash, who had committed an act of bankruptcy, and under the fiat he was adjudged a bankrupt; but the adjudication was not notified in the London Gazette until the 13th of February, 1849. The defendants never had notice of any act of bankruptcy committed, nor of the issuing of the fiat; and the messenger made no seizure of the timber in question. On the 9th of February, 1848, plaintiff Cannan was appointed official assignee; and on the 23rd of February, 1849, the other plaintiffs were appointed creditors' assignees. On the 14th of February, 1849, a petition was presented to annul the adjudication; and on the same day the advertisement of adjudication was suspended by order of the Court until the 13th of February, 1849. The petition was dismissed on the 9th of February, 1849.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover. If the Court were of opinion that the plaintiffs were entitled to recover, judgment was to be entered in their favour for 65*l.* 5*s.* 8*d.*; but, if not, then a *nolle prosequi* was to be entered.

The case was argued in Easter Term, 1851; and, in the succeeding Trinity Vacation, the Court intimated that they entertained grave doubts whether the plaintiffs could all be joined in the action, and they directed the case to be re-argued.

Willes argued for the plaintiffs (April 26).—The defendants will raise three objections to the plaintiffs' right to recover in this action. First, it will be said that the creditors' assignees were not possessed of the property in question at the time of the conversion, or, if they were possessed in point of law, that the declaration ought to have contained an allegation that the conversion took place at the time when the official assignee was appointed, and that the creditors' assignees were appointed afterwards. Secondly, that the defendants were not guilty of a conversion; and, thirdly, that at all events they are protected by the 84th section of the Bankrupt Act, 6 Geo. 4, c. 16.

First, the creditors' assignees are rightly joined as co-plaintiffs, although at the time of the conversion an official assignee had been appointed, and the trade assignees had not then been appointed; for the title and possession of all the assignees have relation back to the act of bankruptcy. This doctrine of relation has been called a legal fiction, but it was in fact created by the express language of the legislature. The 13 Eliz. c. 7, s. 2, enacts, that the Commissioners shall have authority to dispose of all the estate and effects the bankrupt had at the time he became bankrupt; and their order shall be effectual against all persons claiming by any act made or done after such person shall become bankrupt. This is the origin of the relation to the

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act of bankruptcy on which so many important decisions depend: 1 Christian's Bankrupt Laws, p. 11. [*Parker*—That doctrine was fully discussed in *Balme v. Hutton*. *Cooper v. Chitty*(b) is also one of the numerous cases on this subject; and it was there contended that this doctrine if carried out to its full extent, might be productive of the most harsh and cruel consequences. It is well established that this relation back to the act of bankruptcy is good for all purposes. It is clear that, if the creditors assignees are debarred from suing for injuries done to the bankrupt's estate during the interval between such appointment and their appointment, there must exist an element of an anomalous character; and the Court will be under the necessity of holding that this long existing doctrine in relation has been wiped out by modern statutes. By 6 Geo. 4, c. 16, s. 45, the Commissioners were empowered to appoint a provisional assignee of the bankrupt's estate. By the 22nd section of the 1 & 2 Will. 4, c. 56, the appointment of the official assignee was first created. The 1st section, and the 5 & 6 Vict. c. 122, s. 48, declare that, until assignees are chosen by the creditors, the official assignee is authorised to act as the sole assignee of the bankrupt's estate. By these enactments the necessity of the appointment of the provisional assignee was removed; and the official assignee now holds the same situation as the

25th section of the 1 & 2 Will. 4, c. 56, is important, as shewing that, in the case of a fresh appointment of other assignees in lieu of those first appointed, as in case of death or of removal, the estate vests jointly in all the assignees. These sections also shew that the title of the assignees, although they are separately appointed, and at different periods, has reference to the act of bankruptcy. The creditors' assignees were therefore rightly joined in this action; and the declaration correctly alleges that the wrongful act was committed whilst they were possessed of the goods.

Secondly, the defendants were guilty of a conversion by the unauthorised sale of the goods. This case is analogous to the ordinary one of an action of trover against a carrier, for misdelivery by mistake of goods entrusted to him for the purpose of being carried: *Youl v. Harbottle*(a), *Wyld v. Pickford*(b).

Thirdly, the defendants are not protected by the 84th section of the 6 Geo. 4, c. 16. That section enacts, that "no person, or body corporate, or public company, having in his or their possession or custody any money, goods, wares, merchandises, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order; provided such person or company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy." Now this applies only to cases in which the delivery is made before the issuing of the fiat, which now takes the place of the old commission, for the two following reasons—first, because the goods cannot be said to "belong to the bankrupt after the fiat;" and secondly, because the fiat operates as a notice of the act of bankruptcy. [*Parke, B.*—In *Collet v. De Gols*(c), Lord Chancellor Talbot certainly held, that a commission issued is a notice of the

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(a) Peake, N. P., 49. (b) 8 M. & W. 443. (c) Ca. Temp. Talbot, 65.

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bankruptcy; but then the question is, whether the firm stands upon the same footing. Lord *Talbot* there says, "commission is a public act, of which all are bound to take notice; but an act of bankruptcy may be so secret as to be impossible to be known." It may be conceded that the 84th section applies to the case where the delivery takes place after the fiat is issued; but it does not protect the party where the act is done after the appointment of the assignees. At that time the assignees are clearly entitled to this property.—He referred to the 2 & 3 Vict. c. 29.

Hoggins, contra.—First, the 1 & 2 Will. 4, c. 56, s. 2, lays down in express terms the mode in which the property shall vest in the assignees. This is plainly expressed for the guidance of the assignees. And by the terms of that section, the property of the bankrupt "shall in every case be possessed and received by such official assignee alone, save where it shall be otherwise directed by the said Court of Bankruptcy, &c.;" and the section concludes with a proviso, that, until the creditors' assignees are chosen, the official assignee "shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a sole assignee of each bankrupt's estate and effects. At the time of the alleged conversion the plaintiff Cannan was the sole assignee, and was alone possessed of the goods

question, for it merely dispenses with the necessity of a formal instrument of assignment to transfer the bankrupt's personal estate to the assignees.

Secondly, the defendants, having delivered the goods in pursuance of the contract under which they received them, are not guilty of a conversion. A misdelivery would amount to a conversion. The defendants had no notice of the change of property; and they acted strictly in pursuance of the contract under which the goods were deposited with them, by delivering them to the order of the bailor: *Townsend v. Inglis*(a), *Watts v. Ognell*(b), *Knowles v. Horsfall*(c).

Thirdly, the 84th section protects the defendants. The words are general, and the enactment applies where the parties act bonâ fide and without notice. In *Bird v. Bass*(d) it was held, that notice of an act of bankruptcy within the 2 & 3 Vict. c. 29, means *knowledge* of it; and that the issuing of the fiat does not amount to knowledge of the act of bankruptcy. The old commission and the present fiat are different in many respects.

Willes, in reply.—First, until the creditors' assignees are chosen, the official assignee is the sole assignee under the 22nd section of the 1 & 2 Will. 4, c. 56; but, upon their being chosen, the estate of the bankrupt vests in all the assignees jointly, and this has relation back to the act of bankruptcy. The official assignee stands in the same situation as the provisional assignee did under the 6 Geo. 4, c. 16, s. 45.

Secondly, the delivery of the property is not the less a conversion of it, because the defendants had no notice of the change of ownership.

Thirdly, the 84th section does not require that the notice there mentioned should be absolute knowledge of the act

(a) Holt, N. P., 278.

(c) 5 B. & Ald. 134.

(b) Cro. Jac. 192.

(d) 6 M. & Gr. 143.

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of bankruptcy, as appears by reference to the 83rd
which provides for constructive notice of that act.

Cur. adv.

PARKE, B., now delivered judgment.—(After stat
pleadings and the facts of the case, his Lordship proc
—The question for the opinion of the Court is, whet
plaintiffs were entitled to recover the value of the
from the defendants. For the plaintiffs it was argue
by the operation of the bankrupt laws in force at th
when this transaction took place, the property in th
ber vested in all the assignees by relation from the
the act of bankruptcy, and that the delivery by
fendants to the purchasers in pursuance of the orde
the bankrupt was a conversion of the property
cases of *Cooper v. Chitty*(a), *Balme v. Hutton*(b), (
v. *Garland*(c), were cited, and conclusively shew tha
the time of the act of bankruptcy, the goods of the
rupt cease to be his, and become the property of hi
nees, who may maintain an action of trover again
sheriff who executes a writ of fieri facias against the
rupt; subject, of course, to the various limitations
by the enactments of the numerous statutes up
subject.

Three points were made for the defendants:—

chasers); and that the averment that all the assignees were then possessed was not made out, and that the defendants were entitled to the judgment of the Court on the issue raised by the plea of not possessed.

There is no doubt whatever of the truth of the general proposition advanced on behalf of the plaintiffs, that the title of the assignees to the goods has relation back to the act of bankruptcy; and, notwithstanding the great extent to which the application of this rule has been cut down and restricted by modern enactments, it still remains a fundamental rule and principle of the bankrupt laws. (See the note to *Cooper v. Chitty*, 1 Smith's Leading Cases, 236, and *Kynaston v. Crouch* (a).) But we think that the defendants are protected by the operation of the 84th section of the Bankrupt Act, 6 Geo. 4, c. 16, which section enacts, that no person or body corporate, or public company, having in his or their possession or custody any money, goods, wares or merchandise, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order (not stating before the date of the commission), provided he or they had not, at the time of the delivery, notice of the act of bankruptcy committed. It was argued, that the operation of this section is restricted to delivery before the issuing of the commission (now the fiat), until which time the goods may more properly be said to belong to the bankrupt. But we do not think that this is the proper construction of the section. In truth, the goods may in some sense be said to belong to the bankrupt up to the time of the appointment of the assignees; but, in our opinion, the words "goods belonging to the bankrupt" mean goods which belonged to the bankrupt at the time they were deposited in the possession or custody of the person, or body corporate or public company, delivering

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(a) 14 M. & W. 266.

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them, and which would have continued to be his if an act of bankruptcy had not occurred. That was meant by the legislature to protect wharfinger housemen, or dock companies, and other parties in trade it is to hold possession of other men's property to their convenience, which is the character the debt is filled in the present transaction. It was argued on behalf of the plaintiffs, that their view was proved correct by reason of the preceding section of the act. This is an error. The 84th section is a perfect independent section, and has nothing whatever to do with the preceding one. It is taken from, and intended to be a substitute for the 56 Geo. 3, c. 151, which contained two sections, and in substance contains what is contained in the 84th section of the 6 Geo. 4, c. 6, which repealed all the existing bankrupt laws; and it seems perfectly clear that the 56 Geo. 3, c. 137, which was intended to extend a provision of the 1 Jac. 1, c. 15, s. 4, that no debtor of a bankrupt should be endangered by payment of his debt to the bankrupt (which must be understood to mean before he has become bankrupt) was meant to protect the wharfinger or dock company who delivered the goods to, or to the order of, a person whom they were received, before they had knowledge that such person had become bankrupt. We are of the

the same footing as the old commission of bankruptcy was. At the time when this bankruptcy took place, the statute 1 & 2 Will. 4, c. 56, was in force; and by the 12th section, in lieu of a commission, a fiat issued under the hands of the Chancellor or Master of the Rolls, or other Judge or Master of the Court of Chancery, which was afterwards entered of record in the Court of Bankruptcy. In our opinion, that was not a proceeding of the same public notoriety—certainly not until it was entered of record—as the issuing of the commission under the great seal, and does not itself operate as a notice; and we certainly think, that, unless compelled by authority to decide otherwise, we ought to hold notice of an act to be knowledge of it brought home to the mind of the person to be affected by it.

This being our opinion, it is unnecessary to consider the other two points raised on behalf of the defendants. The judgment of the Court, in pursuance of the authority given to us by the special case, is, that a nolle prosequi be entered.

Judgment of nolle prosequi.

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PADWICK v. KNIGHT and Others.

A surveyor of highways cannot justify a trespass under a prescriptive right, or a custom, to take stones from the waste, whether adjoining the sea-shore between high and low water mark, or otherwise, for the purpose of repairing the highways of the parish.

Semble, that it would be a good justification to plead such a prescriptive right in the inhabitants of the parish, alleging that the surveyor was one of the inhabitants.

TRESPASS.—The declaration stated, that the defendant broke and entered a close of the plaintiff, situate in the parish of Hayling South, in the county of South, called the Beach Common, and with the feet of horses and wheels of carts, &c., subverted the soil, &c., and with shovels, &c., dug up and got from the said close stones, and gravel, and carried away and converted the same to their own use.

Second plea—That, for more than thirty years next before the committing of the grievances, there have been and are divers public highways within the said parish; and that the said close was, at the several times when &c., is, part and parcel of certain waste land within the aforesaid. That, for the full period of thirty years before the commencement of this suit, there have been surveyors of and for the said parish of the said highways. That the defendants W. Knight and T. Woodman, at several times when &c., were such surveyors for the said highways being in and for the said parish of the said highways. That W. Knight and T. Woodman, whilst they were such surveyors, and all other surveyors for the time being

carriages, raising, digging up, and getting from and out of the said close the sand, stones, gravel, &c., of and in and upon the said close, and carrying away the same, for the purpose of amending and repairing the said highways, when and so often as need and occasion required. That, at the several times when &c., parts of the said highway within the said parish then being out of repair, and there being need and occasion for soil, sand, stones, gravel, shingle, and beach to repair the same, the defendants W. Knight and T. Woodman then being and as such surveyors in their own right, and the other defendant as their servant and by their command, at the several times when &c., entered into and upon the said close with horses, carts, &c., in order to dig up, and did then, with spades, &c., dig up, take, and carry away from the said close stones, gravel, &c., for the purpose of amending and repairing the said highways; and with the feet of horses and wheels of carriages, &c., necessarily and unavoidably a little subverted the soil, &c., doing no unnecessary damage. That the stones and gravel so carried away were afterwards used by the defendants W. Knight and T. Woodman as such surveyors in and about the necessary repairing and amending the said highways: *quæ sunt eadem*.—Verification.

The third plea alleged the same prescriptive right for sixty years.

Fourth plea—That, from time whereof the memory of man is not to the contrary, there have been, and at the several times when &c., there were and still are divers public highways within the said parish; and that the said close was, at the several times when &c., and still is, part and parcel of certain waste land within the said parish. That, from time whereof the memory of man is not to the contrary, and at the several times when &c., all persons residing within the said parish, whose office or duty within the said parish might require them from time to time to cause all and every highway and highways lying within

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the said parish to be amended and repaired, have been used, and actually enjoyed, and have been used and accustomed to have, use, and actually enjoy, and of right ought to have had, used, and enjoyed, and still of right ought to have, use, and enjoy the right, benefit, and privilege of entering into and upon the said close by themselves or their servants, and with horses, carts, and other carriages, raising, digging up, and getting from and out of the said close the said stones, gravel, &c., and carrying away the same, for the purpose of amending and repairing the said highway, when and as often as need and occasion require. That the defendants W. Knight and T. Woodman, at the several times when &c., were surveyors for the time being, and for the said parish, duly elected and appointed by the inhabitants of the parish, and residing within the parish, and that the duty of the defendants W. Knight and T. Woodman as such surveyors, at the several times when required them to cause the highways of the parish to be amended and repaired from time to time, as need and occasion should require.—The plea then alleged that, highways being out of repair, the defendants W. Knight and T. Woodman as such surveyors, and the other defendant as their servant, entered the close to get gravel for repairing the highways, &c.—Verification.

Fifth plea. That part of the said close in which



the said parish, whose office or duty for the time being within the parish might require them from time to time to cause all and every highway and highways lying within the parish to be amended and repaired, should have the right of entering into and upon the said part of the said close, by themselves and their servants, and with horses, carts, &c., raising, digging up, and getting from and out of the said close the sand, stones, gravel, &c., and carrying away the same, for the purpose of amending and repairing the said highways at all times of the year, when and so often as need and occasion should require.—The plea then alleged, that the defendants W. Knight and T. Woodman were surveyors of the parish, duly elected and residing within the parish, and that their office and duty as such surveyors required them to cause the highways to be amended and repaired; and that, at the several times when &c., the highways being out of repair, they in their own right, and the other defendant as their servant, entered the close, and took the sand and gravel, &c., for the purpose of repairing the highways, &c.—Verification.

Demurrer to each of the above pleas (*a*), and joinders therein.

Montague Smith in support of the demurrers.—The right set up by these pleas cannot be claimed by prescription, either in the inhabitants of a parish or a surveyor of highways. It is clearly not a right within the 2 & 3 Will. 4, c. 71, which was never intended to create new claims by prescription, but only to shorten the period for establishing those which existed at common law. A prescription can only be made in the name of a certain person or his ancestors, or those whose estate he hath, or in bodies politic or corporate, and their predecessors: Co. Litt. 113. b. [*Alderson*, B.—A surveyor of highways need not neces-

(*a*) The plaintiff demurred the case was argued on matters specially on several grounds, but of substance only.

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sarily be a parishioner.] He is a mere statutable of In Black. Comm. vol. 2, p. 263, it is said, "The distinction between custom and prescription is this, that custom is properly a *local* usage, and not annexed to any person; such as a custom in the manor of Dale that lands do not descend to the youngest son; prescription is merely a *personal* usage, as that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to claim such an advantage or privilege." A prescription cannot be legally claimed by persons having no immemorial possession, except it be in respect of the ownership of a particular estate: *Mellor v. Spateman* (a). Moreover, the mode of pleading authorised by the 2 & 3 Will. 4, c. 71, is wholly inapplicable to a claim of this description, and comprises those cases only where persons can prescribe *in* an estate. Neither can this claim be sustained as a profit à prendre in the soil of another, therefore void: *Blewitt v. Tregonning* (b). The distinction between "an interest or profit to be taken or had in another's soil, and an easement in another's soil," is pointed out in *Gateward's case* (c), which decided that there cannot be a custom for inhabitants as such to have a profit à prendre in the soil of another; but that there may be a custom for every inhabitant to have a discharge in his own land, or an easement in the land of another. 7

4, c. 71, was to render valid all claims of profit à prendre which had been enjoyed as of right for the prescribed periods, without reference to the persons who made the claim. The 2 & 3 Will. 4, c. 100, is in *pari materiâ*, and that has been held to create an exemption from tithe in respect of persons who could not, before that Act, have prescribed in *non decimando*: *Salkeld v. Johnson* (a). [Alderson, B.—The language of the two statutes is materially different; in the one, the words are “no claim which may be *lawfully made at the common law* by custom, prescription, or grant,” &c.; in the other, the words are “*all* prescriptions and claims of or for any *modus decimandi*,” &c. So that the 2 & 3 Will. 4, c. 71, embraces such claims only as are made by persons who at common law might lawfully have made them, and was never intended to enable persons to take by user a profit à prendre.] This is, at all events, a good custom at common law. The distinction between prescription and custom is this, that the former implies a legal origin. An officer may prescribe in him and all those *quorum statum habet*: Com. Dig. “Præscription” (A). But a custom need only have a reasonable origin. In the case of *The Mayor and Commonalty of Lynn Regis v. Taylor* (b), it was held that a custom for freemen and proprietors of ships within a borough to dig gravel on the shore for ballast was good, it being for the maintenance of navigation. Here the custom is for the public benefit in repairing highways. The Court there said, “a custom is *lex loci*, and inherent in the soil whereto ’tis fixed, for the service of every one that is qualified to use it; whereas prescription is (fixed) in the person, and, therefore, ought always to be laid in persons or estates of perpetual existence; but ’tis otherwise of customs, as the custom for fishermen to dry their nets on another’s soil; and the custom of the hundred of Wicksworth, in Derby-

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(b) 3 Lev. 160.

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shire, to dig for lead in another's soil so far as the landowner can throw his mattock." In *Johnson v. Wyard* (a), a custom was pleaded for the inhabitants of a parish to dig for gravel from the soil of another for the repair of the highways; but there was no decision as to the validity of the custom, the cause having been settled. A similar custom was pleaded in *Oxenden v. Palmer* (b), and no objection was taken. The case in the Year Book, 8 Ed. 4, 18, which is commented on by *Holroyd, J.*, in his judgment in *Blundell v. Catterall* (c), shews that a custom may exist for fishermen to dig in the land adjoining the sea, to pitch stakes for hanging their nets to dry. All the authorities are cited in *Tyson v. Smith* (d), in which it was held to be a reasonable custom, that, at fairs holden at certain times of the year on some part of the commons and waste of a manor to be named by the lord, every subject exercising the trade of a victualler might enter at the time of the fairs, and for the more conveniently carrying on his trade erect a booth and continue the same for a reasonable time after the fairs, paying 2d. to the lord. So in this case, in treating the close as waste of the manor, there is reasonable ground for presuming that the custom had a legal origin for both the lord and the inhabitants are interested in the reparation of the roads. [*Alderson, B.*—This plea does not state that the roads for which the gravel was wanted

That would be supported by proof that the highways were reparable *ratione tenuræ*, and not by the inhabitants at large. But a person liable to repair *ratione tenuræ* could have no right to go upon the waste and get stones for that purpose.] This plea is a sufficient justification under the Highway Act 5 & 6 Will. 4, c. 50.

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POLLOCK, C. B.—We are all of opinion that the pleas are bad.

ALDERSON, B.—Assuming that such a prescription is good, it ought to be pleaded as an immemorial custom for the inhabitants of the parish to take stones from the waste for the purpose of repairing the highways, averring that the surveyors were two of the inhabitants, as was done in *Johnson v. Wyard*.

MARTIN, B.—I agree with the rest of the Court that these pleas are bad; but I am by no means clear that there might not be a good prescription in the inhabitants of a parish to take stones from the waste for the repair of the highways.

Judgment for the plaintiff.

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June 7.

BLUCK v. GOMPERTZ.

The plaintiff, at the request of the defendant, sold to C. some wine, to be paid for by bills, and received from the defendant the following guarantee, signed by him:—
 "Upon your handing me your two drafts upon C. respectively for 200*l.* and 146*l.* at six months' from this date, I undertake to get them accepted by him, and to see that they are duly paid." It was afterwards discovered that the draft for the wine mentioned as for 146*l.* should have been for 150*l.*; and accordingly the plaintiff drew bills for

ASSUMPSIT.—The declaration stated, that, before the making of the promise by the defendant, one Morgan John O'Connell, by the defendant, who was then his agent in that behalf, bargained and agreed with the plaintiff to buy of him, and the plaintiff then bargained and agreed with the said M. J. O'Connell to sell to him, divers goods and chattels, to wit, ten hogsheads of wine, for divers prices and sums of money, to wit, 200*l.* and 150*l.*; and, thereupon, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, would at his own costs obtain two papers, respectively stamped with a stamp denoting the payment for the use of her Majesty of the duty payable by law in respect of the bills of exchange to be made thereon respectively as hereinafter mentioned, and would on the papers respectively, make his two bills of exchange in writing, and direct the same to the said M. J. O'Connell and thereby respectively require him, six months after the date thereof respectively, to pay to the plaintiff the said prices or sums respectively, and would deliver the said bills of exchange to the defendant, the defendant promised the plaintiff to get the said bills of exchange ac-

six months after the date thereof respectively (which period had elapsed before the commencement of this suit), to pay the plaintiff the said prices or sums respectively, and did then deliver the said bills of exchange to the defendant. And, although the defendant then got the said bills accepted by the said M. J. O'Connell, and although the said bills were duly presented to the said M. J. O'Connell for payment on the day when the same respectively became due, and although the said M. J. O'Connell did not then, or at any other time, pay the said bills of exchange or either of them, of which the defendant had notice, and was requested by the plaintiff to see that the said bills were duly paid; yet the defendant did not nor would see that the same were paid, and they still remain unpaid.

Pleas, non assumpsit, and traverses of the making and delivery of the bills to the defendant.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after Michaelmas Term, 1851, it appeared that the defendant had applied to the plaintiff to supply Mr. M. J. O'Connell with a quantity of wine, to be paid for by bills; which he consented to do upon receiving the defendant's guarantee. The plaintiff afterwards handed to the defendant the warrants for the wine, and the defendant signed and delivered to the plaintiff the following guarantee:—

“ Kensington, March 19th, 1851.

“ Dear Sir,—Upon you handing me your two drafts upon Morgan John O'Connell, M.P., respectively, for 200*l.* and 146*l.*, at six months after this date, I undertake to get them accepted by him, and to see that they are duly paid.

“ I remain, dear Sir, yours truly,

“ To JAMES BLUCK, Esq.

“ HENRY GOMPERTZ.”

On receipt of this guarantee the plaintiff purchased stamps, and prepared to draw the bills; but, finding that

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there had been a mistake of 4*l.* against himself in the calculations previously agreed on with the defendant, entered the intended bill for 146*l.* into one for 150*l.* sent them to the defendant, with a letter explaining the mistake. On the 28th of March the defendant gave to the plaintiff the bills accepted by Mr. O'Connell the defendant then wrote across the guarantee the following receipt, which the plaintiff signed:—

"I have received the two drafts, one being for 150*l.* instead of 146*l.*, there being an error in the invoice of both, accepted by Mr. O'Connell. JAMES BLUCK

Upon this document being given in evidence, it was rejected, on behalf of the defendant, that it was not a memorandum within the Statute of Frauds, which would support the contract as alleged in the declaration, inasmuch as the consideration stated in the memorandum was drawing and delivery to the defendant of a bill for 150*l.* and another for 146*l.*; and that, if the receipt indeed were treated as altering the original document, then it was not signed by the defendant. The learned Judge left the jury to say whether the receipt was indorsed with the defendant's consent, and for the purpose of substituting the 150*l.* bill for the one for 146*l.*; and the jury found that it was. Thereupon a verdict was entered for the plaintiff.

plaintiff. The question, whether each particular case comes within this clause of the statute, depends on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant, except such as arises from his express promise: Chitty on Contracts, p. 442, 4th edit.: *Simpson v. Penton* (a). Here the defendant is liable independently of his express promise, for the consideration, however inadequate, is sufficient to support an original agreement on his part. [*Parke, B.*—This is in point of fact a guarantee for a third party.] Even in that view, there is a sufficient memorandum or note in writing within the statute. The bill for 150*l.* was substituted for that of 146*l.* with the defendant's consent, and for the purpose of carrying into effect the original intention of the parties. [*Pollock, C. B.*—If a person gives a guarantee, and afterwards discovers a mistake, which he corrects, and then re-signs the document, could there be any doubt about its validity? Here the bills are handed over to the plaintiff, and an indorsement is made by the defendant on the guarantee explaining the mistake; that seems to me equivalent to a re-signing, and that there was no necessity for the defendant to perform the idle ceremony of going over his signature with a dry pen.] The meaning of the parties was, that the *price* of the wine should be secured; and when the guarantee was corrected by stating the true amount, it was the same as if it had been originally so drawn. At all events, the undertaking is divisible as to each bill, and the plaintiff is entitled to recover in respect of that for 200*l.*

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Knowles in support of the rule.—There can be no division of this claim, for the declaration alleges an entire contract on the part of the defendant, that, if the plaintiff would procure stamps for and draw two bills of exchange

(a) 2 C. & M. 430.

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of the respective amounts of 200*l.* and 150*l.*, the defendant would see them paid. The plaintiff has never indorsed such bills, so that the consideration for the promise together fails. The Statute of Frauds requires a memorandum of the contract, signed by the party charged, and further, the consideration must appear on the face of the instrument. Here there was no alteration of the contract; the original agreement continued, so far as binding on the defendant. But that agreement does not support the declaration. The indorsement makes no difference, for it is not signed by the defendant, and is not the receipt of the plaintiff, written by the defendant or his agent, and of no more avail than if written on a separate piece of paper. To render the defendant liable, there must be a new agreement according to the statute; that is, an agreement signed by the defendant. A mistake in a guarantee cannot be corrected without altering the instrument itself, otherwise the parties might defeat the object of the statute, which was to exclude all questions requiring evidence in writing of the contract. If a guarantee stated 5*l.* as the consideration, when in fact it was 500*l.*, could the parties agree by parol that the latter should represent the former? Besides, if the effect of an indorsement was to make a new guarantee, then there

O'Connell, one for 200*l.* and the other for 150*l.*, at six months, and deliver them to the defendant, he the defendant would get them accepted, and see them paid when due; and the breach was, that the defendant did not see them paid.

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It appeared that Mr. M. J. O'Connell did purchase two parcels of wine, one for 200*l.*, the other, as it was first supposed, of the value of 146*l.*; and a guarantee was given in this form: [His Lordship read the guarantee.]

As no bills existed at the time the memorandum was signed, and the plaintiff was to draw them, and they could only be drawn on stamps so as to be valid, it followed that the plaintiff was to procure the stamps at his own expense. There was evidence, therefore, in support of the averment of that part of the consideration. It was afterwards discovered by the plaintiff, that the true price of the second parcel was 150*l.* Bills were drawn, payable at the time agreed, for 200*l.* and 150*l.*; the defendant got them accepted, gave them to the plaintiff, and then wrote across the face of the guarantee in his own hand as follows:—"I have received *the* two drafts (one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.*), both accepted by Mr. O'Connell," and the plaintiff signed this memorandum, but not the defendant.

On the memorandum, consisting of these two parts, being produced, Mr. *Knowles* objected, that it was not a memorandum signed by the defendant of the contract declared upon. The original memorandum signed by the defendant was of an executory contract to be performed after the date of the memorandum, in consideration that the plaintiff would draw two bills, one for 200*l.*, and the other 146*l.*, and hand them to the defendant, he the defendant would get the bills accepted and see them paid; and *that* contract was never performed by the plaintiff, for one of 150*l.* was drawn, not 146*l.*; and so far is clear. But for the plaintiff it was contended, that the memorandum

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written on the face of the original guarantee explaining that this was a mistake; that the true contract was a bill of 150*l.*; that the memorandum, therefore, merely rectified a mistake, and being written on the same piece of paper, and on the face of the guarantee which was signed by the defendant, his original signature was a signature to the whole, and so satisfied the enactment of the Statute of Frauds.

If the defendant, by any memorandum signed by him, had stated that the original contract was that, if the plaintiff would procure stamps and draw two bills for 200*l.* and 150*l.*, the defendant would see them paid, but that the latter amount had been by mistake described as 146*l.*, it would have been sufficient; for the Statute of Frauds does not require the contract itself to be in writing, but a memorandum of it; and a memorandum, properly signed, of a verbal contract is quite sufficient; and we also think that words introduced into a paper signed by a party, or an alteration in it, may be considered as *authenticated* by a signature already on the paper, if it is plain that they were meant to be so authenticated. The act of signing *after* the introduction of the words is not absolutely necessary.

The difficulty in the case is, that the words, though written by the defendant across the original guarantee,

150*l.*, previously substituted instead of one for 146*l.* by the plaintiff, should stand in the place of that for 146*l.*, and impliedly, that the defendant should be responsible for it; but also that he admitted that the *original contract* was, that he should procure to be accepted and see paid *any* bill for the amount of the invoice of the second parcel of wine, and that the invoice was 150*l.*, so that there would be proof of the contract alleged in the declaration *in writing*. If so, it may be inferred, from the fact of the second memorandum being written on the same paper by the defendant, that it was meant to be authenticated by the old signature, so as to constitute a memorandum of the defendant's agreement in writing signed by the defendant. If so, the Statute of Frauds has been complied with; and although we have not come to this conclusion without some difficulty and doubt still remaining on the mind of my Brother *Parke*, we think this is the true view of the case (a).

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Rule discharged.

(a) PLATT, B., added—I had great difficulty in bringing my mind to this conclusion, but am now satisfied that the indorsement is part of the contract, and that it is under the signature of the defendant. Suppose that, after this instrument was signed, the defendant, with his own hand, had altered the 146*l.* into 150*l.*; there could be no doubt that there would have been a sufficient contract within the statute, without re-signing the agreement. Then the effect of this memorandum, as it seems to me, is just the

same as if the defendant had written upon the face of it, that “a bill for 150*l.* has been drawn instead of one for 146*l.*, there being an error as to the amount of the invoice price;” and then for the plaintiff to have written underneath, “I have received the two above-mentioned bills.” That being in the handwriting of the defendant, on the face of the original agreement, seems to me to be quite sufficient to justify us in holding that the transaction operates as a signature within the Statute of Frauds.

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June 4.

FOQUET v. MOOR.

Debt on an indenture for rent. Plea, that whilst the defendant was in the occupation of the demised premises, and before the rent became due, it was agreed between the plaintiff and the defendant, that the plaintiff should make certain alterations, and in consideration thereof the defendant should relinquish his interest under the indenture, and accept a fresh lease for seven years at an increased rent; and until such lease should be tendered to the defendant, he should hold the premises as tenant from year

DEBT upon an indenture, whereby the plaintiff demised to the defendant a certain dwelling-house and premises for the term of seven years from the 6th of April, 1845, the yearly rent of 60*l.*, payable quarterly. Breach:—No payment of 45*l.* for three quarters' rent, due the 6th January, 1852.

Plea:—That, after the making of the indenture, and whilst the same was in full force and effect, and before the expiration of the term thereby demised to the defendant, and whilst the defendant was in the occupation of the dwelling-house and premises by the indenture demised, and before the sum of 45*l.* became due and payable, to wit on the 6th of April, 1847, it was then agreed by and between the plaintiff and the defendant, that the plaintiff should, at his own costs and charges, make and execute certain alterations, additions, and improvements in the said dwelling-house before a certain day, being the 6th April, 1848, and one of the days for payment of the quarterly rent; and that, in consideration thereof, the defendant should give up and relinquish to the plaintiff all the defendant's estate, right, title, and interest whatsoever in

seven years from the day and year aforesaid, at a certain increased rent, to wit, 75*l.* for the four first years from and after the 6th of April, 1848, and at a further increased rent of 80*l.* for the residue of the said term; and, until the lease should be tendered to the defendant, the defendant should hold and be possessed of the dwelling-house and premises as tenant from year to year, at the increased rent of 75*l.* a year for four years, and at the further increased rent of 80*l.* for the residue of the said tenancy. Averments—that the plaintiff did execute the alterations, &c.; and that the defendant, in pursuance of the said agreement, did relinquish and give up to the plaintiff all his estate, right, title, &c., under the said indenture and in the residue of the demised term, and held the premises under the agreement; that no new lease was executed; and that divers quarterly payments of the increased rent had been made. By means of which said premises, the defendant then, to wit, on the 6th of April, 1848, became and was tenant from year to year to the plaintiff of the said dwelling-house and premises; and all his estate, right, title, &c., under the said indenture and in the residue then to come of the term in the declaration mentioned, were duly surrendered to the plaintiff by act and operation of law.—Verification.

Replication de injuriâ, and issue thereon.

At the trial, before *Talfourd*, J., at the last Wiltshire Spring Assizes, the defendant gave parol evidence of the facts stated in the plea, there being no written agreement. He also proved that, on one occasion, the plaintiff had distrained upon him for the increased rent of 75*l.* It was objected, on behalf of the plaintiff, first, that the plea was not proved, since the agreement therein stated was a contract for an interest in land within the Statute of Frauds, 29 Car. 2, c. 3, s. 1; and consequently the plea could only be proved by an agreement in writing. Secondly, that the stipulation, that the defendant should hold the premises as

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yearly tenant until the new lease was executed, would operate as a surrender of the former lease. The learned Judge left it to the jury to say whether there was any agreement that, until the fresh lease was executed, the parties should stand in the relation of landlord and tenant; the jury having found in the affirmative, his Lordship directed a verdict for the defendant, reserving leave for the plaintiff to move to enter a verdict for him, if the Court should be of opinion that the plea was not proved.

Kinglake, in Easter Term, obtained a rule nisi to set aside the verdict for the plaintiff, or for judgment non obstat veredicto, on the ground of the insufficiency of the plea. He cited *Donellan v. Reed* (a).

Crowder and Barstow now shewed cause.—First, the agreement, though not in writing, created a new tenancy at an increased rent, and so operated as a surrender of the term granted by the indenture. The meaning of the phrase "surrender by operation of law" is explained by this Court in *Lyon v. Reed* (b), as applying to cases "where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist." All the authorities are collected

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him able to make a lease: (R. Pl. Com. 106a, 107b). Though the new lease be for a less term: (R. Dy. 140b; 2 Roll. 495, 153; 2 Cro. 84). Or by parol, when the first lease was by indenture: (Dy. 140b, 2 Rol. 496, l. 3)." [Parke, B.—This plea does not allege a demise from year to year, but an agreement for a future lease for a certain term; and that, until the lease is executed, the defendant shall occupy the premises as tenant from year to year.] The plaintiff, having distrained for the increased rent under the agreement, cannot now set up the former lease. Besides, the jury have found that the relation of landlord and tenant subsisted under the agreement. The case differs from *Donellan v. Read* (a), for there the tenant's agreement was a mere personal contract to pay an additional sum yearly, in consideration of his landlord making certain improvements in the premises, and was never intended to create a new demise at an increased rent. *Crowley v. Vitty* (b) is also distinguishable, for that was an agreement by the landlord without consideration to accept a reduced rent.—Secondly, the plea is good. A plaintiff need not state in his declaration that an agreement within the Statute of Frauds is in writing; and if a writing be necessary to render the plea good, the Court will, after verdict, construe the plea as alleging such an agreement: *Case v. Barber* (c).—They also cited *Lynch v. Lynch* (d).

POLLOCK, C. B.—This is an application to set aside the verdict for the defendant, and enter it for the plaintiff, or for judgment non obstante veredicto. The objection having been taken at the trial, that the plea could only be proved by an agreement in writing, we are of opinion that the rule must be absolute to enter the verdict for the plaintiff. The plea sets out an agreement for a lease for seven years, part of which agreement was, that in the meantime

(a) 3 B. & Ad. 899.

(b) 7 Exch. 319.

(c) T. Raym. 450.

(d) 6 Irish Law Rep. 131.

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the defendant should occupy as tenant from year to year. It was argued on behalf of the defendant, that, in order to prove the yearly tenancy, it was not necessary, by the Statute of Frauds, that there should be an agreement in writing. But it is clear that an agreement for a lease must be in writing, for it is a contract for an interest in land, and in this case the stipulation as to the yearly tenancy is a mere incident to the agreement. I think, therefore, that the defendant could only prove his plea by the production of an agreement in writing, and consequently he has failed to adduce any legal proof of it. If, indeed, the objection had been passed over at the trial, and the plea had been treated as proved by a parol agreement, I am not prepared to say that after verdict the objection would prevail. It is not necessary, however, to decide that point; all we have now to determine is, whether the learned judge ought not to have directed a verdict for the plaintiff on the ground that the plea could not be proved by parol.

The circumstance of the agreement not having been proved is sufficient for us to make the rule absolute, and it seems to me advisable to advert to the other point in order to remove all doubt upon the subject. The argument for the defendant goes to this extent—that if there be a yearly tenancy under a lease, and the parties make a verbal agreement, for a sufficient consideration, that inste-

prived of a beneficial lease by apparent proof of an agreement to occupy as tenant from year. Under such an agreement as the present, the term created by the existing lease would not be determined by operation of law until the new lease was granted.

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PARKE, B.—I am of the same opinion. No answer has been given to the proposition, which I from the first laid down, viz. that, in order to maintain this defence, the plea must be proved by an agreement in writing. It cannot for a moment be argued that a person could plead a general plea that a lease was surrendered by operation of law, for it is clear that he must shew the facts which constitute such a surrender. This plea does shew the facts relied on, and I agree with the Lord Chief Baron, that nothing short of an express demise will operate as a surrender of an existing lease. It is not necessary, however, to decide that point, because the plea is not proved. The plea alleges a surrender by operation of law by reason of an agreement that a new lease should be granted, and that in the meantime the defendant should become tenant from year to year. In order to make out that the defendant became tenant under that agreement, it must be proved that there was an agreement to take a lease, and to become tenant from year to year until it was executed. The next proposition is that, in order to prove the agreement for a lease, and the tenancy from year to year, which is part of it, there must be some writing. It was argued, that there is no authority for that proposition; but, by the Statute of Frauds, there must be a note in writing of a contract for a future lease. The sole question is, whether the agreement was proved, and it cannot be unless by an agreement in writing. Then it is said, that the agreement alleged in the plea means an agreement by parol. If so, according to the authority of *Case v. Barber* (a), the plea was demurra-

(a) T. Raym. 450.

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ble; but it is questionable whether it is not good verdict, since it will be presumed that the allegations that meaning which is necessary, in point of law, to port the plea; as in the case of a grant of an heredit which lies in grant, and can only be conveyed by de it be not alleged to have been by deed, but is put in and found by the jury, the verdict cures the omi *Lightfoot v. Brightman* (a). But it is not necessary, I cide that now, for it is perfectly clear that the plea, w proved.

ALDERSON, B.—I am of the same opinion.

MARTIN, B.—I am also of opinion that the plea w proved. The action is upon an indenture for rent the plea is, that the parties entered into an agree whereby the existing tenancy was put an end to, an defendant became tenant from year to year. The pl therefore, in substance, a determination of the former by act and operation of law, that is, by reason of a tenancy. But the tenancy alleged is a tenancy from to year, created by the agreement, and of the very es of it; and in order to establish that tenancy, there be proof of an agreement valid in law. But there w such agreement, because the agreement was not in ing. It has been argued that the plea, not being

out going further into that part of the case, I cannot help observing how dangerous it would be to allow any departure from the law, which has gone on step by step, until the doctrine has become really startling. The consequence would be, that, whenever a landlord chose to say that he would take less than the full amount of rent, it would be a question for the jury, whether the parties did not intend to create a new tenancy, which would be a surrender of the previous term by act and operation of law.

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Rule absolute to enter the verdict for the plaintiff.

GEORGE ISAAC JACKSON and HENRY DAVID JACKSON v.
CHICHESTER.

June 4.

SCIRE FACIAS on a judgment for 200*l.* debt, and 11*l.* 3*s.* 8*d.* damages, recovered against the defendant by the plaintiffs, George Isaac Jackson and Henry David Jackson.

Plea.—That, after the recovery of the judgment, and before the issuing of the writ of scire facias, the defendant was a prisoner in actual custody within the walls of a prison in Ireland, &c.; and, being such prisoner, the defendant did, duly and according to the direction and provisions of the 3 & 4 Vict. c. 107, apply by petition in a summary way to the Court for the Relief of Insolvent

Scire facias on a judgment. Plea, that, after the recovery of the judgment, the defendant was a prisoner, and, according to the provisions of the 3 & 4 Vict. c. 107, petitioned the Insolvent Court for his discharge: that the Court made an order, vesting his estate and effects

in the provisional assignee; and that, afterwards, the defendant delivered to the Court a schedule, containing a full and true description of all debts due from him, and of all persons to whom he was indebted, together with the nature and amount of such debts. The plea then stated that the defendant was brought before the Court and examined; and that, by an order of adjudication, it was ordered that the defendant be discharged from custody as to the several debts due to the persons named in the schedule; and that the defendant was, by such order of adjudication, discharged from the said judgment debt. Replication, that the defendant was not by the order of adjudication adjudged or ordered to be discharged from the said debt:—*Held*, that, upon these pleadings, the objection was not open that the schedule did not contain a full and true description of the plaintiffs as judgment creditors, nor of the nature and amount of their debt.

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Debtors for his discharge from such custody, which petition was forthwith filed of record. That, upon the filing of the petition, the Court, by a certain order made in pursuance of the said Act, ordered that all the real and personal estate and effects of the defendant, &c. should vest in J. Molloy, the provisional assignee of the estates and effects of insolvent debtors in Ireland. That, after the making of the vesting order, and within fourteen days after it had been so made, the defendant did deliver into the Court for the Relief of Insolvent Debtors in Ireland a schedule containing (amongst other things) "a full and true description of all debts due or growing due from him at the time of making such order, and of all and every person and persons to whom he was then indebted, or who to his knowledge and belief claimed to be his creditors, together with the nature and amount of such debts respectively." That "the names of the plaintiffs were duly inserted in the schedule as creditors of the defendant, together with a full and true description of the said judgment," and of the debt and sums of money due from the defendant to the plaintiffs under and by virtue of the judgment.—The plea then stated, that the Insolvent Court appointed a day for the defendant to be brought up; that notice thereof was sent to and received by the plaintiffs; that, at the

said order of adjudication, duly discharged from the said judgment for the said debt, damages, and interest," &c.—Verification.

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Replication.—That the defendant was not by the said order of adjudication adjudged or ordered to be discharged from the said debt and sums of money due from the defendant under and by virtue of the said judgment, modo et formâ, concluding to the country.—Upon which issue was joined.

At the trial, before *Cresswell*, J., at the last Liverpool Assizes, it appeared that in the year 1847 the plaintiffs sued the defendant for goods sold and delivered, and recovered against him the judgment set out in the declaration. The defendant afterwards took the benefit of the Irish Insolvent Act, 3 & 4 Vict. c. 107, when he inserted in his schedule the plaintiffs' debt as follows:—

| <i>Names and Descriptions of Creditors and Claimants, and their present or last Residences.</i> | <i>Amount.</i> | <i>When contracted.</i> | <i>Admitted or Disputed.</i> | <i>Nature and Consideration of the Debt and Securities (if any), and if the Debt is disputed, the reason thereof.</i> |
|---|------------------------|-------------------------|------------------------------|---|
| Mr. Jackson, Merchant Tailor, Castle-street, Liverpool, England } | About 100 <i>l</i> . } | 1844 | Admitted | { Mr. Jackson holds my bill for about 60 <i>l</i> . |

It was objected, on the part of the plaintiffs, that the schedule was not in compliance with the 3 & 4 Vict. c. 107, which requires "a full and true description of all debts due or growing due from such prisoner &c., and of all and every person and persons to whom such prisoner shall be indebted, or who, to his knowledge or belief, shall claim to be his creditors, together with the nature and amount of such debts and claims respectively." It was also objected, that the defendant ought to prove the identity

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of the creditor and of the debt. The learned Judge did a verdict for the plaintiffs, reserving leave for the defendant to move to enter a verdict for him.

Watson, in the following Term (April 17), obtained rule nisi accordingly.—He cited *Forman v. Drew* *Hoyles v. Blore*(b).

Mellish now shewed cause, and urged the same objections to the schedule.—He cited *Leonard v. Baker*(c), the 3 & 4 Vict. c. 107, ss. 57, 65.

PARKE, B.—By these pleadings it is admitted that the schedule contained a sufficient description both of the creditor and the debt, and the only issue is on the point of discharge(d). The rule ought, therefore, to be absolute.

POLLOCK, C. B., ALDERSON, B., and PLATT, B., concur.

Rule absolute.

- (a) 4 B. & C. 15.
- (b) 14 M. & W. 387.
- (c) 15 M. & W. 202.

- (d) See *Wallington v. De*
Exch. 284; Frankum v. Es
Falmouth, 2 A. & E. 452.

1852.

PHILLIPS v. POUND.

June 7.

THIS was a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriffs of London as to this action.

An attorney's clerk is not privileged from arrest whilst going to a Judge's chambers for the purpose of there conducting the attorney's business.

It appeared from the affidavits, that the defendant was clerk to an attorney, and in that capacity had obtained a Judge's order for a certiorari to remove a plaint from a County Court into the Court of Queen's Bench on payment of costs, the Judge then stating, that if one of the Masters would certify that those costs would be allowed on taxation, a further application might be made to him to vary the order. The next day the defendant obtained such a certificate from the Master at his office in King's Bench-walk, and was arrested under a ca. sa. whilst bonâ fide proceeding thence with it to attend the Judge for the above-mentioned purpose at his chambers in Rollsgardens, Chancery-lane.

Hannen shewed cause.—There is no authority that the privilege from arrest extends to the clerk of the attorney in the suit. In *Newton v. Constable* (a), it was held that a barrister attending petty sessions for the purpose of obtaining practice, is not privileged from arrest redeundo, even though he has, during the particular attendance, been engaged in defending a party charged with assault.

The Court then called on

Hawkins to support the rule.—The privilege has been held to extend to a person attending the House of Lords as agent for the appellant on an appeal from Ireland: *Ex*

(a) 2 Q.B. 157.

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parte Watkins (a). [Alderson, B.—What is the ground upon which this privilege is claimed?] The attendance of the clerk in the ordinary course of the business which the attorney was employed to conduct. [Alderson, B.—The privilege of barristers and attorneys depends upon prescriptive usage; how can that be extended to an attorney's clerk? If so, why should not a barrister's clerk be also privileged? Certain persons are of necessity privileged; for instance, those attending Courts of justice, because they attend in obedience to the subpoena of the Court.] The rule laid down in *Meekins v. Smith* (b) that all persons who have relation to a cause which calls for their attendance in Court, and who attend in the course of that business, though not compelled by process so to do, are privileged from arrest, provided their attendance be not for any unfair purpose.

POLLOCK, C.B.—There is no ground whatever for the privilege claimed, and the rule must be discharged.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

Rule discharged.

(a) 8 Sim. 377.

(b) 1 H. Bl. 636.

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DAY v. CARR.

June 11.

QUAIN had obtained a rule, calling on one F. Thomas to shew cause why an attachment should not issue against him, for rescuing and carrying away goods taken in execution by the Sheriff of Middlesex, under a writ of fieri facias issued in this cause.

The affidavits in support of the application stated that, on the 5th of May, 1852, the bailiff went to the premises occupied by the defendant, and there seized under a fieri facias "divers property as the property of the defendant." The bailiff then found that the property was advertised for sale on the following morning by one F. Thomas, whereupon he informed the servants of Thomas that he had levied, and that nothing must be removed; and he left his men in possession. He afterwards received a notice from Thomas that the goods were his, and that he required the sheriff to withdraw from possession. The sheriff thereupon obtained an interpleader summons, a copy of which was served upon Thomas on the morning of the 6th of March, before any sale of the goods. Thomas, nevertheless, on the same day, proceeded with the sale, and the whole property was removed from the premises by the direction of Thomas, notwithstanding the opposition of the officers in possession. The interpleader summons was heard on the 7th of May, and dismissed, in consequence of the goods being no longer in the possession of the sheriff.

Lush shewed cause, upon affidavits that the property seized by the sheriff had been assigned by way of mort-

a contempt of Court in carrying away the goods:—*Held*, that he was justified in so doing, the goods being his property, although the interpleader summons was not disposed of.

A sheriff who intends to levy may, before actual seizure, apply for relief under the Interpleader Act.

A bailiff went to the premises of a defendant, and seized the goods there under a fi. fa. The goods were in possession of a claimant, who had advertised them for sale on the following day. The sheriff thereupon obtained an interpleader summons, and served it upon the claimant before the sale. The claimant nevertheless proceeded with the sale, and the goods were removed by his direction, notwithstanding the opposition of the sheriff's officers; on the following day, the interpleader summons was heard and dismissed, on the ground that the goods were not in the sheriff's possession. The claimant was, in fact, entitled to the goods under a bill of sale.

On motion for an attachment against the claimant for doing, the goods

'The Court then called on

Quain to support the rule.—Fi
claimant in selling and removing
to the sheriff's officers, was a con
able by attachment. The legality o
does not affect the question. Eve
assist the sheriff in executing the
Miller v. Knox (a). "A contempt
Court, or an opposing or despisin
or dignity thereof:" *Prac. Reg.* in
thorities are collected in *Miller v.*
that the power to commit for a
from the Statute of Westminster 2
is coeval with the common law.
contempt, for which the Court ma
an attachment: *Hawk. Pleas* of 1
22, sect. 34. The contumacious
senger under a commission of banl
as a contempt of the Great Seal:
that case, as in this, a third pe
Lord *Eldon*, C., however, said, "T
the house, and seize the effects of
posing it to be my order, the p
seize the property of the bankrupt
is to do that at his own hazard, y
down what has been acted upon

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person executing the process enters a house and seizes property not belonging to the bankrupt, making that entry and seizure under colour and by virtue of that authority, he cannot *brevi manu* be turned out." *Ex parte Titner* (a) is an authority to the same effect. Where the sheriff *bonâ fide* seizes property, which it is apparently his duty to take, the Court ought not to leave the right of property to be tried by an indictment for retaking it.—Secondly, by virtue of the Interpleader Act, 1 & 2 Will. 4, c. 58, the sheriff had lawful possession of and a right to hold the property as against the claimant. Before that Act passed the sheriff had no means of investigating the title to property, but was nevertheless bound to seize it. The practice was to enlarge the time for returning the writ, in order that the parties might interplead, the sheriff in the meantime retaining possession of the goods. The object of the 1 & 2 Will. 4, c. 58, was to afford relief in such cases, and it contemplates the fact of the sheriff being in possession of the goods. Indeed, it has been expressly decided that a sheriff cannot have relief under that Act, unless he has possession: *Holton v. Guntrip* (b). [Pollock, C. B.—I do not assent to the doctrine that the sheriff must seize before he makes the application. The language of the 6th section is, "when any claim shall be made to any goods or chattels taken, *or intended to be taken in execution*," &c. In the case of *Holton v. Guntrip*, the sheriff did not mean to seize, for he withdrew upon the claim being set up.] The 6th section incorporates the provisions of the 1st, the recital of which shews that the Act was only intended to relieve persons in possession of the subject matter of the claim. The statute, therefore, having conferred the right to interplead, impliedly confers everything essential to the enjoyment of that right, one requisite being, that the sheriff should have possession of the property seized.—He also referred to *Smith v. Bond* (c).

(a) 1 Atk. 136. (b) 3 M. & W. 145. (c) 13 M. & W. 594.

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v.

CARR.

POLLOCK, C. B.—The rule ought to be discharged. The Interpleader Act clearly empowers the sheriff to apply to the Court, if he goes *with the intention* of levying *unde* *fi. fa.*, and a claim is set up to the goods; and in *ma* cases he may be well justified in coming to the Court fore he perils himself by an actual seizure, under circumstances which might perhaps subject him not only to action for the value of the goods, but also for damages taking them. The cases in bankruptcy, which have be referred to, differ from the present; but, even if they not, I am by no means prepared to say that the decisio in bankruptcy establish the rule which we ought to ad on applications of this kind. The Interpleader Act has bearing on the subject, and we must dispose of this moti as if it had never passed. Looking then to the affidavit upon which it was founded, it appears to me that there no ground for the rule, since it is not stated that the perty seized was the property of the defendant, or that t sheriff believed that it was his property. I must howev add, that the law does not always permit a person to e ercise a right which he undoubtedly possesses, for instan a person may not take forcible possession of his own goo

PLATT, B.—This is an application for an attachment f a contempt of the process of the Court, and certainly it

averment in a plea of justification, that the goods seized belonged to the person whose goods he was by the writ commanded to take. Now, the claimant is called upon to answer why an attachment should not issue against him for doing a lawful act—an act which is not a contempt of the Court, but a contempt of the officer abusing the process of the Court, by seizing the goods of one person under a writ against another.

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MARTIN, B.—I am entirely of the same opinion. This is an application for an attachment, or, in other words, to imprison a person for a contempt of Court. There is no doubt of the possession by the Courts at Westminster of that most valuable power; but a power to imprison without the intervention of a jury ought not to be exercised except upon strong grounds. The proper exercise of the power enforces the respect and obedience which is due from all parties to the process of the Court; but how can the fact of a person taking his own goods be construed into a contempt of Court? I concurred in granting the rule, because there was some pretence for saying that there might have been a contempt of the process of the Court, which placed the sheriff in some difficulty, but that is answered.

Rule discharged (a).

(a) *Parke, B.*, was out of Court.

ber, 1847, letters patent were granted to S.

"for improvements in the manufacture of gelatinous substances, and in the apparatus

to be used therein;" subject to a proviso that S. should, within six months, assign the patent to the public. S. did not do so. On the 24th of May, 1848, S. enrolled such a disclaimer, that on the 24th of May, 1848, S., by indenture, assigned the patent to the public. S., by leave of the Solicitor-General, disclaimed the following invention, "and the apparatus to be used therein;" which disclaimer was entered, pursuant to the statute.—Breach, that, after the disclaimer was entered, S. practiced the invention. One plea, after setting out the specification of S., enrolled a specification of his said invention. A disclaimer was filed pursuant to the statute. At the trial, it appeared that S. manufactured by submitting the cuttings of hides to the action of steam in a paper machine, and employing blood to purify the cuttings. The invention of S. consisted in reducing the hides to shavings, and treating the shavings with blood. The specification was:—"I take the parts of hides, usually called 'glue pie', and reduce them into shavings or thin slices or films by an instrument I have used has been an ordinary carpenter's plane, the edge of the hide; but it will be obvious that any other apparatus may be used, provided the pieces may be reduced into a thin film by rollers. The shavings are then to be put into cold water, at the end of which time such changing is to be repeated two or three times each day until the shavings are either in the water or in the shavings. The shavings are then to be put into a quantity of water sufficient to cover them when pressed down in any vessel, the heat applied should not exceed that of boiling water. The gelatine thus obtained is to be run in thin films on to a smooth surface, and removed on nets to dry, and the dry gelatine is to be cut up by a knife. It is in evidence, that the shavings might be cut either dry or wet, and that the better, so long as the fibrous texture was preserved; and that it might be such as to dissolve the gelatine in the shortest time. The defendant pleads, by a similar process, but he always cut the shavings wet, and made a copy only of the disclaimer was filed:—Held, first, that the plaintiff had infringed a patent, and that the defendant had infringed it.

Secondly, that it was properly left to the jury to say whether the defendant had made a sufficiently sufficient description of the invention.

"for certain improvements in the manufacture of gelatinous substances, and in the apparatus

It then stated the grant, on the 24th of May, 1848, of letters patent to G. Swinborne for

subject to a proviso, that, if G. Swinborne should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing, dated under his hand and seal, and cause the same to be enrolled in her Majesty's High Court of Chancery within six months next and immediately after the date of the letters patent, the letters patent should become void. That G. Swinborne did, within six calendar months after the date of the letters patent, to wit, on the 24th of May, A.D. 1848, by an instrument in writing, to wit, the specification under his hand and seal, particularly describe and ascertain the nature of his invention, and in what manner the same was to be performed; and did afterwards, and within six calendar months next and immediately after the date of the letters patent, to wit, on the 24th of May, A.D. 1848, cause the said specification to be inrolled in her Majesty's High Court of Chancery, at Westminster.—(The declaration then set out an indenture of the 12th of February, 1848, whereby G. Swinborne assigned the patent to the plaintiff.)—That, after the making of the indenture, and after the passing of the 5 & 6 Will. 4, c. 83, and before the committing of the grievances, to wit, on the 24th of May, 1848, G. Swinborne, pursuant to the said statute, and by and with the leave of Sir John Romilly, Knight, then being her Majesty's Solicitor-General, first had and obtained for that purpose, and duly certified by his Sir John Romilly's fiat and signature in that behalf, entered with the Clerk of the Patents of England a certain disclaimer of part of the title of the said invention, stating the reason of such disclaimer, the same not being such disclaimer as extended the exclusive right granted by the letters patent; by which disclaimer, the same being under the hand and seal of the said G. Swinborne, he the said G. Swinborne did disclaim all that part of the title which is contained in the following words—"and in the apparatus to

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put in practice a part of the
did counterfeit, imitate, and re
tion, &c.

Pleas (inter alia)—Third, that
letters patent, to wit, on the 24th
borne made an instrument in w
figures following, that is to say, d
fication) (a); without this, that
instrument in writing, to wit, a
hand and seal, particularly descr
invention, and in what manner
might be performed, modo et fi
country. Fourth, that G. Swinb
calendar months next after the d
cause any instrument in writing
particularly describing and ascer
invention and in what manner
formed, to be duly inrolled in the
Chancery.—Verification. Fifth,
not, at the time of the making
true and first inventor of the inv
mentioned.—Verification. Sixth
of the disclaimer, and also before
same, to wit, on &c., G. Swinbor

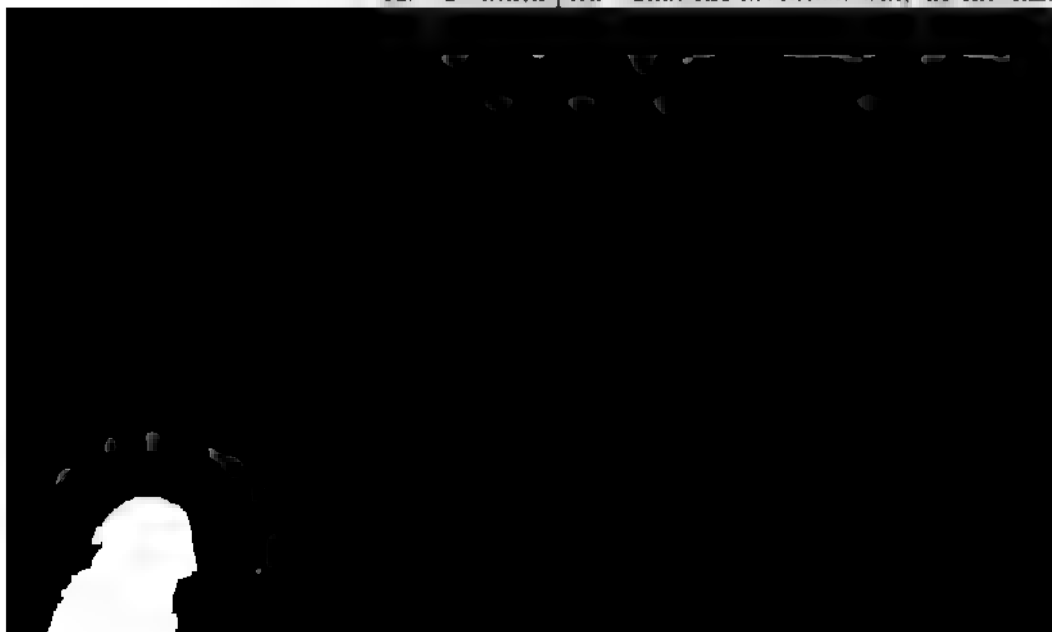
and also at the time of entering of the same, was a person who, as assignee, had obtained the letters patent, and was solely and exclusively entitled to the letters patent. That, at the time of making the disclaimer, and also at the time of entering the same, G. Swinborne was not possessed of or entitled to the said letters patent, or the license, power, privilege, and authority in and by the letters patent so expressed to be given or granted as in the declaration mentioned, or any part thereof, and was not a person who then had the letters patent or any part thereof, or who then could lawfully enter such disclaimer as in the declaration mentioned with the Clerk of the Patents of England, according to the true intent and meaning of the statute; without this, that G. Swinborne, pursuant to the statute, entered with the Clerk of the Patents the said disclaimer of part of the title of the supposed invention, which was as in the declaration mentioned, modo et formâ,—concluding to the country. Seventh, that the disclaimer was not filed and duly inrolled pursuant to the statute in that case made and provided, modo et formâ,—concluding to the country. Eighth, that, before the making of the letters patent, G. Swinborne did represent and suggest to her Majesty the now Queen, that the invention in the declaration mentioned was an invention of improvements in the manufacture of gelatinous substances, and in the apparatus to be used therein; that, on the day of the making of the letters patent, our Lady the Queen believed and confided in, and also acted upon the said representation and suggestion, and so believing and confiding, &c., and in pursuance and in consideration of the same representation and suggestion, did make the letters patent in the declaration mentioned. That the invention was not an invention of improvements in the manufacture of gelatinous substances and in the apparatus to be used therein, in manner and form as by G. Swinborne so represented and suggested to our Lady the Queen.—Verification. Ninth, that the invention in the declaration mentioned was not, at the time

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of the making of the letters patent, an invention of any utility, benefit, or advantage to the public.—Verification. Tenth, that the invention was not, at the time of the making of the letters patent, and before the committing of the grievances, a new invention as to the public knowledge thereof within the realm.—Verification. Eleventh, that the letters patent in the declaration mentioned were not letters patent and grant of privilege of the sole working or making of any manner of new manufacture.—Verification. Twelfth, not guilty.

The plaintiff joined issue on the third, sixth, seventh, and last pleas; and replied to the fourth plea—That G. Swinborne did, within six calendar months next after the date of the letters patent, cause a certain instrument in writing under his hand and seal, particularly describing and ascertaining the nature of the invention, and in what manner the same was to be performed, to be duly inrolled in her Majesty's High Court of Chancery. To fifth plea—That G. Swinborne was, at the time of the making of the letters patent, the true and first inventor of the invention. To eighth plea—That the invention was an invention of improvements in the manufacture of gelatinous substances and in the apparatus to be used therein, except so far as the same was and is disclaimed as in the declaration mentioned. To ninth plea—That the invention was, at the time



24th of November, 1847, to one G. Swinborne, for "certain improvements in the manufacture of gelatinous substances, and in the apparatus to be used therein." On the 12th of February, 1848, Swinborne, by indenture, assigned the patent to the plaintiff. On the 24th of May, 1848, Swinborne inrolled in the Court of Chancery a specification under his hand and seal, which, after reciting the patent, proceeded as follows:—

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"Now know ye, that, in compliance with the said proviso, I, the said G. Swinborne, do hereby declare the nature of my said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement thereof, that is to say:—Heretofore, in manufacturing gelatine, it has been usual, with one exception, to act on what may be called large pieces of hides or skins, and to employ acids or alkalies, together with mechanical and other processes, which not only take up a considerable time but are also costly; and in the excepted case above referred to, it has been the practice to reduce the portions of hides used into the state of pulp in a paper machine, and then to employ blood to purify the product obtained. Now my improvements consist of a much more simple mode of manufacturing gelatine than any other heretofore practised. And in order that my invention may be more fully understood and readily carried into effect, I will now proceed to describe the means pursued by me. I take the hides or skins, or parts of hides or skins, such as are usually called 'glue pieces,' free from hair, as fresh and as sweet as possible; and my process commences by reducing the whole into shavings or thin slices or films, by any suitable instrument. The instrument I have used has been an ordinary carpenter's plane, the shaving being cut from the edges of the hide or skin, or piece of hide or skin; but it will be obvious that other apparatus may be employed for that purpose, or that the pieces may be reduced into a thin film by rollers.

three times each day, until no more is ex-
tracted either in the water or in the
are then to be removed from the
otherwise. If it is intended for sale
be dried on nets or other convenient
will be ready for the market. If
extracted, the shavings, after the
are to be subjected to heat, with a
sufficient to cover them, pressed down
taking care that the heat applied is
of boiling water. The gelatine, when
to be strained through linen or other
slight pressure by the hands or other
may be suffered to run off from the
thing, by which much of the gelatine
the fibrous matters. This is the best
and will be found of great purity ;
nearly, if not entirely, free from oil
gelatine thus obtained is to be run
smooth surface of slate, or other
and then to be removed on to net
practised ; and the dry gelatine is to
be cut with a glass cutter or other suitable
will then be fit for the market, as
suited to those for which gelati-

Another manufacture of gelatinous substances, according to my invention, is produced from cod sounds or other fishy matters capable of yielding gelatine. For this purpose, I take such matters and reduce the same into shavings or thin films, and then treat the same by soaking in water and by heat, and extract the gelatine, and strain or run off the gelatine in the same manner as above described; and I obtain a first, second, and third product of gelatine, which I form into sheets, which when dry are cut up with an isinglass cutter. This manufacture of gelatine will be found highly useful as a cheap substitute for isinglass for clarifying liquids. Having thus described the nature of my invention, and the manner in which the same is to be performed, I would have it understood that I do not confine myself to the exact details so long as the peculiar character of my invention be retained. But what I claim is, the manufacturing gelatinous substances by reducing the matters herein referred to into shavings or thin slices or films, and treating them as above described."

On the 24th of May, 1848, Swinborne also inrolled, at the foot of the specification, a disclaimer of the following part of the title of the patent—"and in the apparatus to be used therein." A *copy* of this disclaimer (the original having been certified by the fiat and signature of the Solicitor-General), was filed by the Clerk of the Patents of England (a). According to the plaintiff's evidence, the hides of animals are composed of cellular tissues, in which gelatine is lodged, together with albumen and other foreign substances. Eminent chemists, however, differed as to whether gelatine was an educt or a product. For many

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(a) It appeared, that, since the passing of the 5 & 6 Will. 4, c. 83, the practice had been to bring to the office of the Clerk of the Patents the specification and disclaimer having the Attorney or

Solicitor-general's fiat and signature attached, together with a copy of the disclaimer; upon which the officer filed the copy, and made an entry thereof in a book.

cess, the hides were cut and sul-
caustic alkali (a). The objection

(a) The following is the material part of the specification of Nelson's patent :—

"My invention consists in using or applying to the glue pieces, which I use, the caustic alkaline solution, either with or without acid or acids (not being sulphurous acid in a liquid state). I prefer to use the cuttings of hides of calves. When the cuttings have been freed from hair, flesh, and fat, and washed in cold water, I score the grain side of them to the depth of about an eighth part of an inch, in lines about an inch apart, in order to facilitate the action of the alkali which I use, and to render such action more uniform. I then macerate them in a caustic solution of alkali, at a temperature of about 80 deg. of Fahrenheit, using for this purpose brick vats or vessels lined with cement in the ordinary manner. These vats must be covered with lids, excluding the general atmosphere. I thus

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the alkali had a tendency to soften the fibrous tissue, and render it soluble in hot water, so that the fibrine mixing with the gelatine, the latter would be impure and of a yellowish colour. In the year 1844, J. & G. Cox obtained a patent for a new method of manufacturing gelatine, by reducing the hides to pulp, and cleansing it by a stream of water running through the pulp (a). The defect of this

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water to pass freely through them, and may be fitted in the water vessels in any convenient manner to allow their revolving within such vessels. Then I cause the cylinder to revolve slowly in the water. I have found cylinders three feet long a convenient size, and I cause these to revolve at a speed of about one revolution in a minute; and whilst the washing cylinders are thus revolving, I cause a current of water to be kept up through each of the water vessels by means of an aperture at the bottom of the vessel at one end, and a pipe at the top of the opposite end, and through which pipe clean cold water is continually supplied. I continue the cylinder revolving in the current of water until the alkali is sufficiently washed out of the cuttings. When the cuttings have been thus washed, I place them in a wooden closet constructed in the ordinary mode to prevent the escape of gas, and there expose them to the direct action of sulphurous acid gas, produced by the combustion of sulphur within a closet. I continue the cuttings thus exposed to the direct action of this gas until they have

a slight excess of acid, which I ascertain by testing them with litmus paper. I then remove them from the closet, and press them by any ordinary means to separate as much water as possible; and after they have been thus pressed, I put them into a glazed earthenware vessel, and I apply steam to them in the manner usually employed for heating the steam bath. I thus bring the cuttings to the temperature of about 150° of Fahrenheit; and by means of a suitable instrument, I stir and agitate them until they are almost entirely dissolved. The liquid thus formed is gelatine. I separate it from the residuum, which remains undissolved, by straining, and put it into settling vessels, which are constructed in the same manner as the steam bath. Whilst the liquid gelatine is in the settling vessels, it should be kept to a temperature of about 100° to 120° of Fahrenheit. After the gelatine is sufficiently settled, I pour it on slabs to cool, &c."

(a) The following is the material part of the specification of Cox's patent:—

"Our improvement in the

manufacture of gelatine consists in a superior method of treating, cleansing, and dissolving hide or skin pieces, and in refining and evaporating gelatine or glue. We prefer to use shoulders and sheets of ox hide, but other parts may be used. These are first cleansed well in pure water, after which we cut them into small pieces by a convenient machine exactly similar to that used for cutting straws, and we afterwards subject small cuttings to what we call a pulp mill, similar to that used by paper makers for reducing rags to pulp. By this process, the gelatinous fibre is thoroughly washed and cleansed, as we keep a stream of pure water flowing into the pulp mill during the operation, so as to wash away all impurities. When the hide pieces are sufficiently cleansed and reduced to pulp, it is pressed betwixt rollers or other convenient way, and afterwards mixed with fresh water sufficient to dissolve it. It is now to be subjected to heat varying from 150° to boiling point;

advantage of thus cutting was to expose the greatest possible surface to the action of cold water, which removed the impurities, but would not dissolve the gelatine. The same effect might be produced by squeezing the hide between rollers. The shaving could be done with the hide either dry or wet, but the rolling would require the hide to be dry. The plaintiff usually cut from eighteen to twenty to the inch. An ordinary carpenter's plane would cut twenty or more to the inch in a dry state. The plaintiff had latterly cut the hides wet by means of circular cutters fixed in a cylinder of wood and turning on axletrees, which was considered an improvement on the dry cutting. In order to make good gelatine, it was necessary that the process should be short as to its duration, and as little heat should be used as would dissolve the gelatine in the shortest time. It was important that the heat applied should be below 212 degrees of Fahrenheit, since water below that temperature would act on the gelatine, but not on the fibrous texture. The defendant manufactured gelatine by a process similar to the plaintiff's, but he always cut the hides wet, and from twelve to the inch. Amongst other testimony on the part of the defendant, a witness named Cox deposed that, prior to the year 1847, he had manufactured gelatine, without caustic, alkali, or acids, by a process similar to the plaintiff's. He cut the hides wet, about eighteen to the inch.

It was objected on the part of the defendant, first, that the cutting of a material into thin slices, which was the essence of this invention, could not be the subject of a patent, or, if so, it was not new. Secondly, that the specification was insufficient, inasmuch as it did not state whether the hides were to be cut dry or wet, nor whether they were to be cut thick or thin, nor what was the minimum of heat to which the shavings were to be subjected. Thirdly, that, in support of the third issue, the plaintiff was bound

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Judge overruled the third objection to the specification in fact describing it as not new; and reserved the right to move to enter a verdict for the plaintiff against him. His Lordship directed the jury on the sixth and seventh issues to the defendant with respect to the third issue to the jury to say, first, whether the specification was reasonably sufficient, telling them to define the invention, so that a man might do it, and so as to lie and not to embarrass the invention. Secondly, whether the invention is, a new mode of making something. Thirdly, whether the plaintiff was the first inventor. Fourthly, whether the defendant had introduced the invention. The judge found these questions in the affirmative and directed a verdict for the plaintiff on all the issues.

Crowder, in the following Term, moved for a new trial, or to enter a verdict for the defendant on the third and seventh issues, pursuant to the order of the court, or to arrest the judgment, on the ground that on the face of the declaration, the defendant had entered the disclaimer.

the misdirection, he submitted, that the learned Judge ought to have ruled, that the cutting thin slices or shavings could not be the subject of a patent; also that the learned Judge was incorrect in leaving to the jury the question as to the sufficiency of the specification, which was a point of law.

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PER CURIAM.—With respect to the motion to enter the verdict for the defendant on the seventh issue, on the ground that the disclaimer was not filed pursuant to the 5 & 6 Will. 4, c. 83, s. 1, we are of opinion that there ought to be no rule. The statute does not require that the Attorney-General's fiat should be filed, but only that there should be some formal act on the records of the Court notifying that the party has disclaimed; and that has been done here.

Rule refused on that point, granted on the others.

The *Attorney-General*, *Webster*, and *Fletcher* shewed cause (a).—They argued, first, that the result of the plaintiff's process was to produce a new and useful manufacture; and that was sufficient to support the patent.—Secondly, that it was a question for the jury, whether, upon a fair and reasonable construction of the specification, it did not sufficiently describe the invention.—Thirdly, as to the motion to enter the verdict for the defendant on the third issue: It is said that the plaintiff was bound to prove a specification, not only of the process, but also of the apparatus. But the 5 & 6 Will. 4, c. 83, s. 1 (b), renders the

(a) The case was argued in Hilary Term, (Jan. 20 and 22), and in Easter Term, (April 23).

(b) Sect. 1. "Whereas it is expedient to make certain additions to and alterations in the present law touching letters pa-

tent for inventions, as well for the better protecting of patentees in the rights intended to be secured by such letters patent, as for the more ample benefit of the public from the same: Be it enacted, &c.: That any person, who, as

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disclaimer, when filed and enrolled, part of the letters patent; so that they must be read as if the grant had originally been for the process only, and consequently there was no necessity to specify the apparatus. The specification,

grantee, assignee, or otherwise, hath obtained, or who shall hereafter obtain, letters patent for the sole making, exercising, vending, or using of any invention, may, if he think fit, enter with the Clerk of the Patents of England, Scotland, or Ireland, respectively, as the case may be, having first obtained the leave of his Majesty's Attorney-General or Solicitor-General in case of an English patent, of the Lord Advocate or Solicitor-General of Scotland in the case of a Scotch patent, or of his Majesty's Attorney-General or Solicitor-General for Ireland in the case of an Irish patent, certified by his fiat and signature, a disclaimer of any part of either the title of the invention or of the specification, stating the reason for such disclaimer, or may, with such leave as aforesaid, enter a me-

son may enter a caveat, in like manner as caveats are now used to be entered, against such disclaimer or alteration; which caveat, being so entered, shall give the party entering the same a right to have notice of the application being heard by the Attorney-General or Solicitor-General, or Lord Advocate, respectively. Provided also, that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*) pending at the time when such disclaimer or alteration was enrolled, but in every such action or suit the original title and specification alone shall be given in evidence, and deemed and taken to be the title and specification of the invention for which the letters patent have been or shall have been granted:



however, is in accordance with the title of the patent, for it describes an apparatus; and if it be said that the patent is bad because the apparatus is not new, then that objection is not open under this form of plea: *Derosne v. Fairie*(a). *Croll v. Edge*(b) is distinguishable, for there the specification was larger than the title.—On this point they also cited *Jupe v. Pratt*(c).—Fourthly, as to the motion in arrest of judgment. The grantee was the proper person to enter the disclaimer, notwithstanding he had parted with all his interest in the patent. The 5 & 6 Will. 4, c. 83, s. 1, enables “any person who, as grantee, assignee, or otherwise, hath obtained” letters patent, to enter a disclaimer. If the word “obtained” is to have its strict technical meaning, no effect can be given to the word “otherwise.” The word “obtained” is used as synonymous with “become possessed of,” and will include every person who has an exclusive right to use the invention, whether as grantee, assignee, or licensee, an exclusive license not being invalid: *Protheroe v. May*(d). In *Spilsbury v. Clough*(e), it was considered that the grantee only could disclaim; and *Coleridge, J.*, observed, that the word “assignee” might perhaps be used to denote a person to whom some foreign discovery has been assigned, and an English patent granted for the use of it. The correctness of that decision was questioned in *Russell v. Ledsam*(f), and the 7 & 8 Vict. c. 69, passed in order to remove all doubt. The 5th section (g) of that Act empowers the assignee to disclaim,

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(a) 2 C. M. & R. 476.

(b) 19 L. J., C. B., 261.

(c) Webst. Pat. Cas. 143.

(d) 5 M. & W. 675.

(e) 2 Q. B. 466.

(f) 14 M. & W. 574; 16 M. & W. 633; 1 H. L. Cas. 687.

(g) Enacts, “That, in case the original patentee or patentees hath or have departed with his

or their whole, or any part of his or their, interest by assignment to any other person or persons, it shall be lawful for such patentee, together with such assignee or assignees if part only has been assigned, and for the assignee or assignees if the whole hath been assigned, to enter a disclaimer and memorandum of

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but does not take away the grantee's right. Since it is the duty of the grantee to enrol the specification, and the disclaimer is to be enrolled with the specification, the disclaimer is properly made by the grantee. The disclaimer when enrolled, becomes part of the letters patent, and the whole must be considered as one instrument, open from the date of the original grant: *Perry v. Skinn*, *Stocker v. Warner* (b), *Regina v. Mill* (c). By the 5th section of the 7 & 8 Vict. c. 69, the disclaimer, when enrolled and filed, is valid and effectual in favour of any person in whom the rights under the letters patent are lawfully vested. Suppose the case of two joint owners, one of whom refused to disclaim, the Attorney-General, having satisfied himself that a disclaimer ought to be entered, would be justified in allowing it, and when filed it would be binding on the party, notwithstanding his dissent. The legislature has provided sufficient protection for the public by requiring a caveat to be entered; and the Attorney-General would prevent a stranger from entering a disclaimer in one respect a grantee has an interest in the patent, although he has assigned the whole of it, because an extension might be granted to him: 7 & 8 Vict. c. 69, s. 4. If he should enter a disclaimer without due authority, he would be subject to an action. [*Parker, R.*—The 5th section of the 7 & 8 Vict. c. 69, says, "that no objection shall be made

making the disclaimer had not sufficient authority in that behalf." That seems to cure all objection.] Moreover, the question is not open on this record, because the declaration shews a sufficient title in the plaintiff, and would have been good without the averment as to the disclaimer. (They then argued that the verdict was not against the evidence, and commented on the affidavits in support of the testimony of the witness Cox.)

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Sir *F. Kelly*, *Crowder*, and *Hindmarch*, in support of the rule.—They argued, first, that there was no novelty in the invention.—Secondly, that the specification was bad, inasmuch as it did not state whether the shavings were to be cut wet or dry; that it was too vague as to the thickness of the shavings; and that, though it was material that the gelatine should be subject to only so much heat as would dissolve it in the shortest time, that proper degree of heat was not specified.—Thirdly, the defendant is entitled to the verdict on the third issue. The declaration alleges, that Swinborne was the inventor of two things, viz. an improvement in the manufacture of gelatinous substances, and also an improvement in the apparatus; it then alleges a grant to Swinborne of a patent for those two things, subject to a condition that he should enrol a specification of that invention. The plea denies that he has enrolled such a specification; and in fact there is no specification of *improvements* in the apparatus, but only in the manufacture. [*Parke*, B.—Would not the declaration have been good if it had alleged the enrolment of a specification for an improvement in the manufacture of gelatinous substances only? Then, by entering a disclaimer, the patent becomes a patent for the undisclaimed part of the invention.] The patent should have been so described. Though the disclaimer may alter the patent, it cannot affect the meaning of the allegation


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in the declaration. The question raised on this issue is, whether there was an enrolment of such a specification as was a valid performance of the condition imposed by the grant. The declaration alleges, that the grantee undertook, by his specification, to inform the public by what means two improvements could be effected, and the objection is the same, whether he describes one thing only, or describes two, and one is no improvement: *Losh v. Hague* (a). [Parks, B., referred to the judgment of *Tindal*, C. J., in *Cook v. Pearce* (b).]—Fourthly, the declaration is bad. A grantee who has parted with his entire interest in the patent cannot disclaim. The language of the 5 & 6 Will 4, c. 83, left it doubtful whether the right to disclaim was not confined to the original patentee. *Russell v. Ledsam* (c) in effect decided, that the person having the legal interest must disclaim. The 7 & 8 Vict. c. 69, s. 5, was passed to remove all doubt where the patentee had wholly or in part assigned his interest; and in the former case, it empowers the patentee and assignee jointly, in the latter the assignee alone, to disclaim. Looking to the construction put upon the statute in *Russell v. Ledsam*, it can scarcely be contended that an assignee could disclaim after he had assigned all his interest in the patent: then how can a grantee? [Alderson, B.—Suppose an assignment in trust, and a disclaimer by the cestui que trust, would not that be valid by

claim depends solely on the statute, and, unless exercised by the person whom it authorises, is void. The latter part of the 5th section of the 7 & 8 Vict. c. 69, does not alter the former, but is merely declaratory of the effect of a disclaimer when entered by the proper person. The words "such disclaimer" mean a disclaimer by the assignee alone, or by the assignee and patentee jointly. Unless that construction be put upon the section, a disclaimer by a stranger would be valid. [*Parke, B.*—The Attorney-General, before granting his fiat, would satisfy himself that the party applying to enter the disclaimer had an interest in the patent. In *Perry v. Skinner*, this Court thought that the Act never intended to give a disclaimer a retrospective operation, since it would be unjust to make a person a wrong-doer by relation. But, in *Regina v. Mill*, the Court of Common Pleas said, that the Attorney-General, in the exercise of his discretion, would take care that injustice was not done to third parties or to the public. The true construction of the latter part of the 5th section is, that if the disclaimer is allowed by the Attorney-General, there shall be no inquiry as to the authority under which it was entered.] It is submitted that the meaning is, that no objection shall be made if the disclaimer be entered as authorised by the previous terms of the section. [*Parke, B.*—That construction would give no effect to the words "on the ground that the party making the disclaimer had not sufficient authority in that behalf."] The other construction would impose upon the Attorney-General the duty of investigating every applicant's title, and of judging who was the right person under the statute to disclaim. But the Attorney-General cannot proceed judicially, for he has no power to administer an oath (5 & 6 Will. 4, c. 62, s. 13). If the grantee denied that he executed the assignment, how could the Attorney-General decide that question? The legislature merely intended

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that the Attorney-General should take care that the disclaimer or alteration did not extend the exclusive right granted by the patent. [*Alderson*, B.—Suppose an assignment, to which there was some objection in point of law, but the Attorney-General treats it as a legal assignment and allows the assignee to enter a disclaimer, surely the Act of Parliament intended that the Attorney-General should exercise that power, and that his discretion should be final; if not, it would be competent for a defendant, at the trial of the validity of a patent, where a disclaimer had been entered, also to try the validity of the assignment. As between the grantee and assignee, it is reasonable to leave the matter to be discussed, but not as between the grantee or assignee and third persons. *Parke*, B.—If the grantee became bankrupt, and his assignees disclaimed, would it be competent for a person who infringed the patent to dispute all the steps relating to the bankruptcy? If a disclaimer by the grantee will enure to the benefit of the assignee, it will also enure to his prejudice; and consequently a grantee, after assignment, might enter a disclaimer, which would render the patent worthless, and then infringe it. In *Regina v. Mill* (a), the disclaimer was filed after issue joined as to the sufficiency of the specification, and the question was, whether the disclaimer was admissible in evidence without being pleaded *puis darre*.

dict was against the evidence, and that the affidavits upon which the rule was granted supported the testimony of the witness Cox.

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Cur. adv. vult.

POLLOCK, C. B., now said—This was a motion for a new trial, or to enter the verdict for the defendant on the third issue, or to arrest the judgment on account of the insufficiency of the declaration. The grounds for the motion for a new trial were, first, that the verdict was against the evidence; secondly, that the learned Judge misdirected the jury; and thirdly, upon affidavits in support of the testimony of a witness named John Cox. The action was for the infringement of a patent for the manufacture of gelatine, and at the trial a verdict was entered for the plaintiff on all the issues. As to the verdict being against the evidence, my Brother *Alderson*, who tried the cause, was not dissatisfied with the finding of the jury, and there will be no rule on that ground.

It appears to us, without entering minutely into the merits of the patent, that the plaintiff's process was new, and different from any other disclosed in the specifications given in evidence, and that it was indisputably useful. We think, also, that the ground of misdirection fails, and that the case was properly left to the jury.

With respect to the motion to enter the verdict for the defendant on the third issue, we are of opinion that the verdict is right. It was contended, on behalf of the defendant, that the form of the issue made it necessary for the plaintiff to prove the enrolment of a specification, not only of improvements in the process but also of improvements in the apparatus; and that, although the declaration might have been so framed as to require proof of a specification of improvements in the process only (for it is that for which the patent, after the disclaimer, must be

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considered as having been granted), yet that this issue was not supported by such proof. We think, however, that the objection is not open under this plea. There is a specification, not only of a process but also of an apparatus, namely, the use of the plane. A patent for such an apparatus might be bad for want of novelty; but that question does not arise upon this plea. We therefore think that the verdict on the third issue ought not to be disturbed.

Upon the point as to arresting the judgment, the ground of which was, that it appeared on the face of the declaration that the disclaimer was entered, not by the plaintiff but by the grantee of the patent, after he had assigned all his interest to the plaintiff, we think that the rule must be discharged. It was contended, on the part of the defendant, that the patentee had no power to enter the disclaimer after he had assigned all his interest in the patent. The 5 & 6 Will. 4, c. 83, s. 1, gives a power to disclaim any part either of the title of the invention or of the specification, with the leave of the Attorney or Solicitor-General. If the question had depended upon that statute alone, some doubt might have been entertained whether a patentee, after having assigned all his interest, could enter a disclaimer; but we think that the 7 & 8 Vict. c. 69, s. 5, has put an end to all doubt, by expressly enacting that

the defendant to contest the validity of the patent, the Court ought not to grant a new trial, but leave the defendant to proceed by scire facias, if he should be so advised.

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Rule discharged.

HORTON v. THE WESTMINSTER IMPROVEMENT COMMISSIONERS.

June 12.

THIS was a rule calling on the defendants to shew cause why they should not pay to the plaintiff the amount of the Master's allocatur, made under a Judge's order of the 19th of March, being the amount of the plaintiff's costs taxed under the following circumstances:—

It appeared that the venue was originally laid in Surrey, and that notice of action was given for the Surrey Spring Assizes, the commission day being the 22nd of March. On the 13th of March, the defendants had obtained a Judge's order for the inspection of certain documents; and on the 19th of March they obtained the following order:—

“Horton v. Westminster Improvement Commissioners.

“Upon hearing counsel on both sides, and on reading the affidavit of &c., I do order that the plaintiff do, if in his power, produce and shew to the defendants, their attornies or agents—a letter, written and sent by one J. B. Farmer to the plaintiff on or about the 1st day of June, 1851; and a letter, written and sent by one A. G. Pooley to the plaintiff, on or about the 2nd of June, 1851,—within ten days; and that the defendants be at liberty to take extracts or copies thereof, on payment of such costs as the Master may think fit on taxation. That, if the plaintiff

A Judge's order was obtained by the defendants three days before the commission day of the assizes at which the plaintiff intended to try the cause, whereby it was ordered, that the venue be changed on payment of costs (to be taxed) become fruitless by such change of venue; and, by the order, the inspection of certain documents was allowed, and a prior order, which had been obtained for a similar purpose, was enlarged for ten days. The order was drawn up and served by the defendants, but they did not take any steps towards changing the venue, which was afterwards changed by the plain-

tiff:—*Held*, that the plaintiff was entitled to the costs of the proceedings which had become fruitless by the change of venue.

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shall not be able to produce the letters, he shall make and file an affidavit to that effect within three days, and that, in default thereof, all further proceedings be stayed until produced.

"That the venue be changed to Middlesex on payment of costs (to be taxed) become fruitless by such change of venue. That the plaintiff be at liberty to demur generally to any of the pleas pleaded, counsel's fees to be allowed in costs; and that the time for inspection under the order herein of the 13th of March, 1852, be also enlarged for ten days."

The defendants not having drawn up the order on the morning of the 19th, the plaintiff, between four and five o'clock in the afternoon, obtained a summons for an order to compel the defendants to abide by the terms of the order obtained by them. Between five and six on the afternoon of the same day, the defendants' attorney drew up and served on the plaintiff's attorney the order of the 19th of March, solely, as was stated in the defendants' affidavit, in consequence of the above-mentioned summons having been obtained by the plaintiff. It was solely in consequence of the order of the 19th of March that the plaintiff had suspended his preparations for the trial of the cause at the Surrey Assizes. The defendants took no steps



ditional one, and the defendants had the option of changing the venue upon payment of costs; but the order is not an absolute order upon, and an undertaking by, the defendants to pay the costs. The defendants were at liberty to avail themselves of the order or not; and, although the venue was changed, it was not changed by the defendants. The language of the order might easily have been so framed as to render the defendants liable at all events to the costs; but that has not been done. The authorities are opposed to the construction the plaintiff seeks to put upon this order. In *Fricker v. Eastman* (a), a Judge's order, "that, upon payment of costs by a certain day, all proceedings should be stayed," was held conditional only upon the defendant. In *Price v. Philcox* (b), the words "upon payment" were held not to raise an implied undertaking. And in *Pugh v. Kerr* (c), a rule to change the venue on payment of the costs of the application, and of all costs bonâ fide incurred and rendered useless by the rule, was also held by the majority of the Court to be conditional only, and therefore that the defendant was not bound to abide by it. *Rese v. Fenn* (d) and *Field v. Sawyer* (e) are also in point.

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Garth in support of the rule.—The payment of the costs is the consideration of the contract, by the terms of which the defendants obtained leave to change the venue. They are bound to pay the costs. In *Pugh v. Kerr*, *Parke*, B., in the course of the argument, says (e), "what are ordinary words of condition, may be made words of contract and obligation;" and in his judgment, after stating that he had had considerable doubt during the argument, he says, "The words used in the rule no doubt ordinarily import a condition only; but if I were satisfied that it was

(a) 11 East, 319.

(d) 2 Dowl. P. C. 182.

(b) 7 Dowl. P. C. 559.

(e) 5 M. W. 167.

(c) 5 M. & W. 165.

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REGINA v. HODGSON.

June 8.

THIS was an estreat of recognisances.—The writ commanded the sheriff of Westmoreland to levy, out of the goods and chattels of the several persons named in the schedule annexed to the writ, the several sums of money charged upon them &c., and to make a due return to the writ. Among the list of persons mentioned in the schedule, appeared the name of the defendant Miles Hodgson, as follows:—"Michaelmas Term, 13 Vict. 1849.—Of Miles Hodgson, of Kirkby Lonsdale, in the county of Westmoreland, shoemaker, one of the sureties for John Thornton, because he did not pay to the prosecutor his costs, taxed according to the course of the said Court, upon an indictment for certain misdemeanors whereof he was convicted, as by the course and practice of the said Court he ought to have done, but made default—40*l*." To this writ the sheriff had made a return, in which he certified that he had been served with a copy of an order made by *Talfourd*, J., by which the said Miles Hodgson should have till the eighth day of the then next Term, to appear and plead to the said estreat. The defendant in his plea cravedoyer of the roll of estreat, and set it out, by which it appeared, that one John Thornton was indebted to the Crown in 80*l*., Henry Robinson in 40*l*., and the said Miles Hodgson in 40*l*.; John Thornton for not paying the costs of the prosecution upon a certain indictment upon which he had been convicted, and the said Henry Robinson and Miles Hodgson as his sureties. The plea, after protesting against the validity of the estreat, proceeded as follows:—"For plea nevertheless, and for discharge of the recognisance, the defendant says, the said recognisance is as follows (setting it out), by which the defendant acknowledged that John Thornton owed to the Crown 80*l*., the said Henry

The sureties of a defendant, on the removal of an indictment for a misdemeanor by certiorari from the quarter sessions, where the defendant has been convicted, are liable to pay the prosecutor his costs, although there is no such undertaking in the condition of the recognisance, or direct provision to that effect in the statute 5 Will. & M. c. 11.

The recognisance, in the margin of which there was the name of the county of "W.," was stated to have been taken before "J. T., Esq., one of the justices for the county of W.:"—*Held*, that it sufficiently appeared, on general demurrer, that the recognisance had been taken in the county for which the said J. T. was a justice.

or issues that may be joined in the same Term, or at the next assizes in the same Term in and for the county of Westmorland, the said Court shall not appoint any time for the trial thereof, then the said attorney shall give due notice of such trial to the said defendant, and shall appear from Court, and not depart until discharged, and then his recognisance to be void, of force.)"

The recognisance had "Westmorland" in the margin of it, and was stated to have been made before "John Tatham, Esq., one of the Justices of the Peace for the county of," &c. The plea was that, previously to entering into the plea to the bill of indictment had been proceedings for the county of Westmorland against John Thornton, for not having paid the costs of an appeal against a certain certificate of the Court of Quarter Sessions, which he had obtained by stopping up and diverting a port at Kirkby Lonsdale. The plea was that J. Thornton stood indicted with respect to the said costs, and that the said indictment was by order of the Court of Quarter Sessions moved into the Court of Queen's Bench.

joined thereupon; and further, that the said John Thornton afterwards, on &c., at Appleby, in the county of Westmoreland, at his own proper costs and charges, did cause and procure the said issue, so joined as aforesaid, to be tried in the due course of law at the assizes, then and there holden in and for the said county of Westmoreland, being the assizes next after the same Term in and for the said county; and further, that upon the trial the said John Thornton was found guilty of the charge laid against him in the indictment, and that previously to the said trial he did give notice thereof to the prosecutors, and that he did appear from day to day in the Queen's Bench, and did not depart therefrom until he was committed to prison; that he was adjudged by the Queen's Bench to two months' imprisonment; that he remained in prison two months, and then was discharged by the Queen's Bench without a day being given to him to appear; and that no other judgment was ever given against him.—Verification and prayer of judgment, &c.

Replication, that, at the time of the granting the writ of certiorari, the Court of Queen's Bench ordered that the said John Thornton should enter into a recognisance in the sum of 80*l.*, with two manucaptors or sureties in the sum of 40*l.* each, according to the statute; and that thereupon the said John Thornton, and the said Henry Robinson and Miles Hodgson as the manucaptors or sureties of the said John Thornton, did enter into the said recognisance mentioned in the said estreat; that, after the said conviction of John Thornton, the Court of Queen's Bench, according to the statute, gave to the said prosecutors (naming them) of the said indictment the reasonable costs had, laid out, and expended in and about the prosecution by them of the said indictment to be paid to them, and referred the taxation of the costs to the attorney of the Court; that he taxed the costs at 79*l.* 2*s.*, and that the allocatur for that amount was served upon J. Thornton, and

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the amount demanded of him; that the said John Thornton refused to pay; that the said allocatur was afterwards served upon Henry Robinson and the defendant, and the amount demanded of them. That afterwards an attachment was issued against John Thornton for contempt non-payment of the said amount, that he was attached and that at the time of the said attachment and of the said estreat the sum of 79*l.* 2*s.* remained unpaid.—Pray of judgment, &c.

Demurrer, and joinder therein.

Pashley (*Henniker* with him) in support of the demurrer.—The defendant is not liable to the payment of the costs on default in payment by the principal to the bond for the defendant has in all respects fully performed the condition of the recognisance. If the sureties are to be subjected to the payment of the costs, the condition of the recognisance ought to provide for such liability. The recognisance is entered into in pursuance of the 5 & 6 W. M. c. 11, the 2nd section of which (a) provides against d

(a) The 5 & 6 Will. & M., c. 11, s. 2, enacts as follows: "That, in Term time, no writ of certiorari whatsoever, at the prosecution of any party indicted, be here-

sitting in open Court. And that all the parties indicted, prosecuting such certiorari before the allowance thereof, shall find to sufficient manucaptors, who shall

lay in the trial of the indictment; and the 3rd section, which provides for the taxation and payment of the costs, enacts, "that the said recognisance shall not be discharged till the costs so taxed shall be paid." [*Martin*, B.—Does the defendant seek to have this recognisance discharged?] It is unnecessary to contend that the recognisance should be discharged. [*Alderson*, B.—The object of the statute is to bring the cause to trial, by which term

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Assizes to be held for the county wherein the said indictment or presentment was found after such certiorari shall be returnable, if not in the cities of London, Westminster, or county of Middlesex; and if in the said cities or county, then to cause or procure it to be tried the next Term after, wherein such certiorari shall be granted, or at the sitting of the said Term, if the Court of King's Bench shall not appoint any other time for the trial thereof; and if any other time shall be appointed by the Court, then at such other time, and to give due notice of such trial to the prosecutor or his clerk in Court; and that the said recognisance and recognisances taken as aforesaid shall be certified into the said Court of King's Bench with the said certiorari and indictment, to be there filed, and the name of the prosecutor (if he be the party grieved or injured) or some public officer to be indorsed on the back of the said indictment; and if the person prosecuting such certiorari, being the defendant, shall not, before allowance thereof, procure such manucaptors to be bound in recognisance as

aforesaid, the justices of the peace may and shall proceed to trial of the said indictment at the said sessions, notwithstanding such writ of certiorari so delivered."

Section 3 further enacts: "That if the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, that then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tithingman, churchwarden, or overseer of the poor, or any other civil officer who shall prosecute upon the account of any fact committed or done that concerned him or them as officer or officers to prosecute or present, which costs shall be taxed according to the course of the said Court; and that the prosecutor for the recovery of such costs shall, within ten days after demand made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant by the said Court for such his contempt; and that the said recognisance shall not be discharged till the costs so taxed shall be paid."

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I understand the consequences of the trial are to be included, and that would include the costs.] The 3rd section does not expressly enact that the bail shall be liable for these costs. The prosecutor's remedy is by attachment against the principal. The statute ought to be strictly construed.

Secondly.—The recognisances are void, the magistrate having acted without jurisdiction. By the 2nd section of the statute, the manucaptors shall enter into the recognisance before one or more justices of the peace "of the county or place." Here the recognisance is stated to have been entered into before one of the justices "for the county," but not before one acting "in and for the county." It does not appear that the magistrate acted within his jurisdiction. *Reg. v. Inhabitants of Stockton* (a) is expressly in point. It was there held, that an order of removal having the marginal venue "Borough of K." and commencing upon the complaint of —, churchwardens &c. "unto us G. C. and T. F." being two of the justices of the peace for the said "borough of K," did not shew sufficiently that the justices heard the complaint within the jurisdiction. The complaint should appear to be heard by justices "in and for," &c. *Reg. v. Lynch* (b), *Day v. King* (c), and *Reg. v. Toke* (d), are in favour of this objection. [*Martin*, B., referred to *Taylor v. Clemson* (e) *Alderson*, B., *The re-*

sions in other cases, but has been always overruled. In *Rex v. Finmore* (a), the defendant removed an indictment into the Court of King's Bench by certiorari, giving the usual recognisance under this statute, and was found guilty, and died before the day in banc; and it was there held, that his bail were liable to the payment of the costs. In *Rex v. Teal* (b), the Court of King's Bench refused to discharge the recognisance till the taxed costs had been paid to the prosecutor. The present objection is in effect an application to discharge the recognisance without payment of the costs. *Rex v. Bezant* (c) is a recent and direct authority to the same effect, and is a complete answer to the objection, that the recognisance itself does not contain any express undertaking by the surety for the payment of the costs.—He was then stopped by the Court.

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POLLOCK, C. B.—I am of opinion that the Crown is entitled to judgment. With respect to the second point, it appears, upon reference to the precedents, that both they and the practice of the Courts are opposed to the argument in support of that objection. With respect to the first and principal point, the older authorities cited shew that the bail are liable for these costs; and accordingly, in the more recent decision in the Court of Queen's Bench, it was held that the bail were liable, although no express mention be made of the costs in the condition of the recognisance. If we were to give judgment for the defendant, we should in effect discharge the recognisance, which the Act of Parliament says is not to be done till the costs shall be paid; and, in truth, there is no distinction between an application to discharge the recognisance and the present objection to the recognisance being enforced.

ALDERSON, B.—I am of the same opinion. In the mar-

(a) 8 T. R. 409.

(b) 13 East, 4.

(c) 7 Dowl. P. C. 680.

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gin the county is mentioned, and the magistrate must be presumed to have taken the recognisance in that place. Many cases are to be found where the act is taken to have been done at the place stated in the margin of the instrument. With respect to the other point, I quite agree that our judgment ought to be for the Crown. The 3rd section imposes the obligation upon the sureties, who enter into the recognisance to pay the costs. The 2nd and 3rd sections may be taken together, so that the parties bind themselves to procure the issue to be tried in proper time, and that the defendant shall come up to be punished, and that the bail shall be liable to the payment of the costs. It therefore seems to me, that the recognisance still continues in force until these costs are paid, and that the liability of the sureties stands upon the footing it would have done if the condition had expressly subjected them to this liability.

PLATT, B., after stating the substance of the 2nd and 3rd sections of the statute, added, that he was also of opinion that, inasmuch as the recognisance could not be discharged without the payment of these costs, the defendant was liable in this form of proceeding.

MARTIN, B.—If it were not for the authorities upon the



ment. Then the 3rd section enacts that, if the defendant be convicted, the party injured shall have his reasonable taxed costs, and that the prosecutor for the recovery of such costs shall, within ten days after demand made of the defendant and refusal of payment, on oath, have an attachment granted against *the defendant* for such contempt; and the section concludes by enacting that "the said recognisance shall not be discharged till the costs so taxed shall be paid;" and it has been held in several cases, that under these words the bail are liable to these costs. There is a case as late as the year 1841 upon this point, where the decision was given after time taken for consideration. I feel myself bound by these authorities; but if the question were to arise in a Court of error, I should hesitate before I came to the conclusion that the bail are liable for these additional expenses.

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Judgment for the Crown.

COE v. PLATT.

June 3.

IN this case, the judgment having been arrested by this Court (a), and the judgment of the Court below having been affirmed on error, the declaration was amended by the insertion of the allegation, that a certain part of the mill gearing by which the accident was occasioned, was in motion at the time for a manufacturing process. To this

The machinery of a cotton factory was worked by a steam-engine, which drove an horizontal shaft, passing along the lower floor of the factory.


This horizontal shaft moved several vertical shafts which passed through the upper floors, and worked the machines by which the cotton was manufactured in the different rooms of the factory. One of these vertical shafts had its fencing removed for the purpose of repair, and all the machines which were worked by this shaft were at rest; but the vertical shaft itself revolved, and the process of manufacture continued to be carried on in the other rooms of the factory:—*Held*, that the master of the factory was not liable under the 21st section of the Factory Act, 7 & 8 Vict. c. 15, for an accidental injury occasioned to a little girl, in the room where no manufacturing process was being carried on, by the revolution of this vertical shaft.

(a) See the case, 6 Exch. 752, and 7 Exch. 460, in error.

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declaration the defendant pleaded several pleas, and (inter alia) traversed the preceding allegation.

At the trial, before *Cresswell, J.*, at the last Liverpool Assizes, it appeared that the action was brought to recover compensation for an injury which the plaintiff had met with under the following circumstances: The defendant was the owner of an extensive cotton factory, in which the plaintiff was injured. The machinery by which the cotton was manufactured was moved by a steam-engine. An horizontal shaft, driven by the steam-engine, passed along the lower floor of the factory, which was several stories in height. This horizontal shaft, by its revolution, moved several vertical shafts, which passed through the different floors and rooms of the factory; and by means of these vertical shafts (which did not themselves admit of being thrown out of gear) the several machines by which the manufactures were carried on, were worked. On the day when the accident occurred, the fencing had been removed from one of these vertical shafts, for the purpose of having it repaired; and all the machines for manufacturing the cotton in the room where the accident happened, and all those usually connected with this shaft in other parts of the factory, were at rest. The plaintiff, who was a young girl, had been directed by a person to sweep up some rubbish, and in so doing she went too near the shaft and



Atherton having obtained a rule nisi accordingly,

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Knowles, Hugh Hill, and J. Henderson shewed cause (May 26) (a).—In order to render the defendant liable for the consequences of this accident, the plaintiff must shew that the defendant has been guilty of a breach of the requirements of the 21st section (b) of the 7 & 8 Vict. c. 15. The statute is restrictive, and imposes severe penalties upon parties who disobey it; and therefore, according to the well-known rule, it ought to receive a strict construction. The simple question is, whether this vertical shaft, from which the fencing had been removed, was at the time in motion for a manufacturing process. The interpretation clause, section 73, shews, that horizontal and vertical shafts are to be considered as different and distinct parts of the machinery; and, although the horizontal shaft by which the vertical shaft was moved was in motion for manufacturing processes, yet the vertical shaft itself communicated no such motion to any other machinery; and if this vertical shaft had been altogether removed, the manufacturing processes then carried on in other parts of the

(a) Before *Pollock*, C. B., *Alderson*, B., *Platt*, B., and *Martin*, B.

(b) That section enacts, "That every fly-wheel directly connected with a steam-engine or water-wheel or other mechanical power, whether in the engine-house or not, and every part of the steam-engine and water-wheel, and every hoist or teagle near to which children or young people are liable to pass or be employed, and all parts of the mill gearing in a factory shall be securely fenced, and every wheel race not otherwise secured shall be fenced close to the edge of the wheel race;

and the said protection of each part shall not be removed while the parts required to be fenced are in motion by the action of the steam-engine, water-wheel, or other mechanical power for any manufacturing process."

The 73rd section, the interpretation clause, enacts (inter alia), that "the words 'mill gearing' shall be taken to comprehend every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley, by which the motion of the first moving power is communicated to any machine appertaining to the manufacturing processes."

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v.

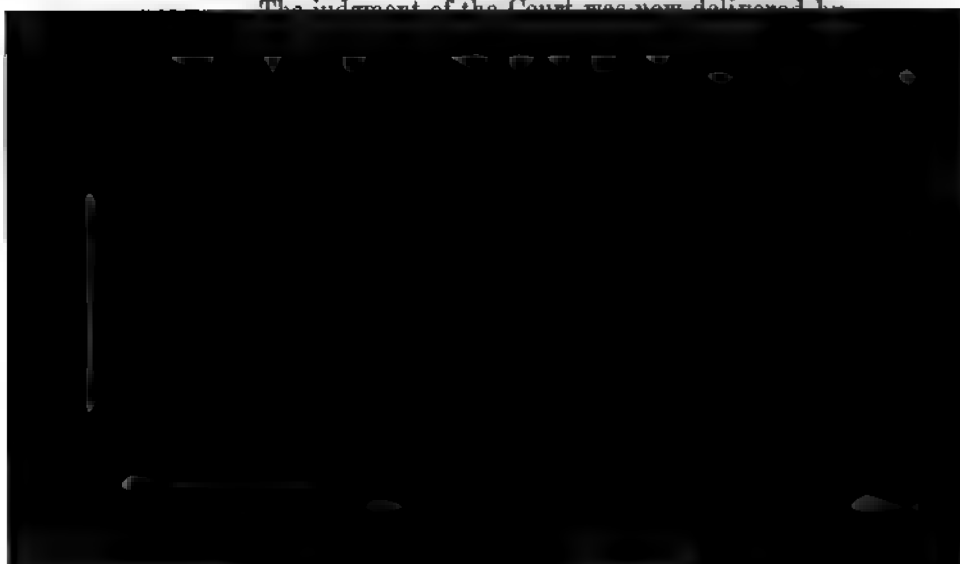
PLATT.

factory would not have been disturbed. If the plaintiff's construction of the statute were to hold good, it could not be carried out, for it would be impossible, during the time any part of the machinery is undergoing repair, to fence that particular part whilst in motion, for the purpose of ascertaining whether it works in a proper manner. And further, if, for instance, some small drum were out of order, and the fencing were removed from it, according to the plaintiff's contention, it would be necessary to stop all the other works throughout the whole mill, which could never have been intended by the legislature. For these reasons the defendant is not liable.

Wilkins, Serjt., and *Atherton*, in support of the rule, contended, that the main object of the Act being to protect young children in the mill at the time the manufactures were being carried on, the Act ought to receive such a construction as would give full effect to every word it contained; that the horizontal and vertical shafts were so connected together that one could not move without the other moving also, and, consequently, that the vertical shaft was in motion for a manufacturing process.

Cur. adv. vult.

The judgment of the Court was now delivered by



chinery might be set to work again, for the purpose of resuming the manufacturing process, in the room where the plaintiff was at the time. The arrangement of the machinery in this factory was this: The original moving power was conveyed along the lower floor of the factory by an horizontal shaft, which communicated motion by its own revolution to certain machinery there used for the first process in manufacturing cotton. This same horizontal shaft communicated also motion to one or more vertical shafts, each passing through the upper floors in succession, and being used, a part of it in each floor, for turning machinery there situate. Each of these vertical shafts was so placed as to be turned whenever the horizontal shaft revolved, and none of them could be stopped, so long as the motion of the horizontal shaft continued.

At the time of this accident, one of these shafts, having a portion of it passing through the floor where the plaintiff was, required some adaptation to the machinery usually worked on that floor, and was under repair for that purpose. It was not, at the time, employed in communicating motion to any machinery usually working and communicating directly with it, situate either on that or any other floor above or below. In fact, all the machinery actually moving at the time of the accident was moved either by the horizontal shaft alone, or by it and the other vertical shafts in the factory, and would all of it have continued in exactly the same motion, if this particular vertical shaft had been wholly removed, or had never existed at all.

The question is, whether, under these circumstances, the Act imperatively required the defendant to keep the fence round this vertical shaft at this time and under these circumstances. The question depends on the 21st section of the Factory Act, 7 & 8 Vict. c. 15, considered in connection with the 73rd section, the interpretation clause. The 21st section is as follows: [His Lordship stated it, and proceeded:] Now, I cannot help thinking, that the

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probable intention of the legislature in this clause was, to give full protection to children and young persons, who were engaged in attending to their duties on the machinery put in motion by the mill-gearing in the rooms or floors where such manufacturing process was going on, and that the protection was to be confined to the times when such process was going on there; for there seems to be no reason to give protection by fencing when no one was, in the usual course of his or her ordinary duties, likely to be there at all; and this would be accomplished by our holding that the mill gearing in each separate room is separate and distinct from the mill gearing in any other room, and requires fencing only while some manufacturing process is going on in that room, and it is in motion for that purpose. This is, I think, the proper construction of the 21st section. But, undoubtedly, it may be plausibly argued, that the whole of each vertical shaft is but one mill gearing, and that, if it is turning machinery in another room, it is in motion for a manufacturing process; and, if this were the case here, it might be fit to have a further argument before we decided otherwise. This case also might be put as one of some difficulty: suppose the injury arose from the defective fencing-off of this horizontal shaft at a time when, by its own proper revolution, it was not turning any machinery in the ground floor immediately

mediately with the machinery on the ground floor by means of the horizontal shaft, but *not turning* that machinery by means of its connection with the original moving power, but itself *turned* by the horizontal shaft which alone communicates with that original moving power. In truth, this vertical shaft was turning (actively and of itself) not being at all used for any manufacturing process. It did not, therefore, require at that time to be fenced. The defendant has not been neglectful at common law, nor has he omitted anything required of him by law. The rule, therefore, must be discharged.

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 v.
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Rule discharged.

MITCHESON v. NICOL.

June 5.

ASSUMPSIT for the freight of goods from Bombay to London.—Pleas, first, except as to 156*l*. 18*s*. parcel, The defendant, a merchant in London, chartered a vessel of the plaintiff's

to bring from Bombay a full and complete cargo at 3*l*. 5*s*. per ton. The defendant's agents at Bombay filled the carrying part of the vessel, and also the cabin, with their own goods, and consigned them to the defendant, as their factor, for sale. There was contradictory evidence as to the terms upon which the cabin was filled. The bill of lading was annexed to a bill of exchange, drawn by the agents upon the defendant, which bill of exchange was sold to a third party. On the arrival of the ship in London, the plaintiff claimed freight for the cabin at the then current rate of 7*l*. per ton. The defendant insisted that he was entitled to the use of the cabin as well as the other part of the ship at the rate of 3*l*. 5*s*. per ton, but he charged his agents for freight at the rate of 7*l*. per ton, and allowed them commission at that rate. The goods were stopped, the bill of exchange not having arrived at maturity, when this action was brought to recover the above rate of freight for the use of the cabin. The defendant, after action brought, paid the bill, and obtained possession of the goods:—*Held*, first, that the defendant was not, under the terms of the charterparty, entitled to load the cabin.

Secondly, that the Judge properly directed the jury, that, although the defendant's agents at Bombay had no authority from the defendant to put goods in the cabin, yet, as the defendant adopted their act by accepting the goods and charging his agents freight in respect of them, he was bound to pay the plaintiff the current rate of freight at the time of loading.

Thirdly, that the action was not brought too soon, since the taking to the goods for the purpose of obtaining freight rendered the defendant liable irrespectively of his actual possession after action brought.

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reloading the said ship at Bombay, to commence and be computed from the period of the vessel being clear and ready for that purpose, the said master giving freighter's agents written notice to that effect; and twenty days on demurrage over and above the said laying days, at 8*l*. per day; sufficient cash for ordinary ship's disbursements to be advanced the master, free of interest and commission, not exceeding 450*l*., for which the master is to give a bill upon the owner at the current rate of exchange, at usance, which he hereby engages to accept, and to take in part payment of freight. All goods to be brought to and taken from alongside at the expense and risk of the freighters, and the master to sign bills of lading at any rate of freight required, without prejudice to this charterparty. The owner to have an absolute lien upon the cargo for all freight, dead freight, and demurrage, &c. Penalty for non-performance of this agreement 2500*l*."

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The ship proceeded to Bombay, where she received a cargo of goods, which completely filled her hold, from Messrs. Nicol & Co., the defendant's agents, and who had received a letter of instructions from the defendant upon the subject. The plaintiff's case was, that, after the vessel was so laden, Messrs. Nicol & Co. proposed to the captain, that, as there were no passengers, goods should be stowed in the cabin; that the captain consented to this proposal; and as freights had risen considerably, 7*l*. per ton instead of 3*l*. 5*s*. was agreed upon as the amount of freight; and accordingly, goods to the extent of forty-eight tons and upwards were stowed in the cabin. There was, however, contradictory evidence as to the amount of freight to be paid for the cabin.

On the 11th of August, 1847, the following bill of lading of the cottons so shipped in the cabin was signed by the master:—

port of discharge, primage and
witness &c.

The bill of lading contain-
ment:—

“Memorandum

“210 bales, measuring cubic 24
ton.

“Tons 48—124 D, at 7*l*. per to

This bill of lading was annexed
the same date, drawn by Messrs
defendant, for 1574*l*. 4*s*., payable
which bill of exchange was sent
pany, and transmitted to London
so annexed, as a security for it
arrived in London on the 29th
delivered all her cargo into the
usual stop order for freight. The
plaintiff sent in his freight account
defendant charged his agents
freight at the rate of 7*l*. per ton
allowed them commission after

to fill the cabin as well as the hold of the vessel at 3*l.* 5*s.* per ton; and, in consequence, this action was commenced in March, 1848. From the arrival of the vessel in November, 1847, up to the 10th of June, 1848, the above-mentioned bills of lading remained in the hands of the East India Company as such security as above mentioned; and the goods, which the bills represented, were entered at the Docks in the name of the Company. On the 10th of June, 1848, the defendant paid the bill of exchange, and thereby became entitled to the bills of lading and the goods; and, having signed the usual request to the Company to deliver the goods to his agents, the goods were accordingly received by them.

The learned Judge left it to the jury to say, whether the vessel could reasonably have carried these goods in the usual and proper place for stowing the cargo; and they found that the goods in question were over and above what the defendant was entitled to have brought to London in the ship. His Lordship then told the jury, that, although Messrs. Nicol & Co. had no authority from the defendant to put the goods in the cabin, yet if the defendant, on the arrival of the ship in England, took to the goods as goods brought home in the ship, to the freight of which he was entitled, he was bound to pay what would amount to a fair and reasonable rate of freight from Bombay to London; and that the parties were not bound by the freight stipulated for in the charterparty. A verdict was found for the plaintiff, with 204*l.* 14*s.* damages.

In Hilary Term last (January 13), *Bramwell* moved for a rule nisi for a new trial, on the ground of misdirection. He also submitted that, by the terms of this charterparty, the whole ship was demised; that it must be understood as an agreement by the shipowner to appropriate to the cargo the entire ship, with the exception of such part as was necessary for the crew and the navigation of the

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ship, and consequently that the defendant was entitled to load the cabin. The Court, however, were clearly of opinion, that as no mention was made of the cabin, it was excepted, and that the question upon this part of the case had been properly left to the jury; and therefore there ought to be no rule on that point.

A rule nisi having been granted upon the other points,

Crowder and Needham shewed cause (April 24).—There was evidence in support of the defendant's liability to pay freight at the rate of 7*l.* per ton, for the goods with which the cabin was loaded. It may be admitted that, in the first instance, the goods were shipped without the defendant's authority; but, upon their arrival in England, he adopted the act of his agents abroad; and although it may not be clear whether the defendant was the owner of the goods, that does not, under such circumstances, affect the plaintiff's right to the freight. The defendant adopted the act of the parties who placed the goods on board, by accepting them, by charging to and receiving from Messrs Nicol & Co. freight at the rate of 7*l.* per ton, and by allowing them commission upon this particular transaction at that rate. He has, therefore, had the benefit of the shipment of the goods, and the plaintiff is entitled to pay

of the act; and the precise period at which such evidence arises is wholly immaterial to the maintenance of the action.

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Bramwell and *Willes* in support of the rule (May 24).—The learned Judge was incorrect in telling the jury, that the defendant was bound to pay a reasonable rate of freight for the use of the cabin. The goods were shipped by the defendant's agents, who were the owners of them, and from whom alone the debt was due, consequently there was no consideration for a promise by the defendant to pay, except by the delivery of the goods to him. But that is not the liability stated in the declaration; and in fact the defendant did not obtain possession of the goods until after the action was commenced. At all events, the transaction does not amount to a contract on the part of the defendant to pay freight upon any other terms than those stated in the charterparty. He accepted the goods under the mistaken notion that the cabin was included. *Sanders v. Vanzeller*(a) shews that, even where by the terms of the bill of lading goods are deliverable to the consignee on payment of freight, that does not impose upon him an absolute liability to pay; but it is a question for the jury, whether or not, upon the facts, there was a contract by him to pay freight. The defendant is not liable, on the ground of ratification of the act of his agents, for that took place after action brought. The Statute of Frauds affords a strong illustration of the rule, that no action can be maintained until the cause of action is complete; for although that statute only requires some memorandum in writing of a contract, not that the contract itself should be in writing, nevertheless a memorandum signed after action brought is insufficient to support it. It should have been left to the jury to say, whe-

(a) 4 Q. B. 260.

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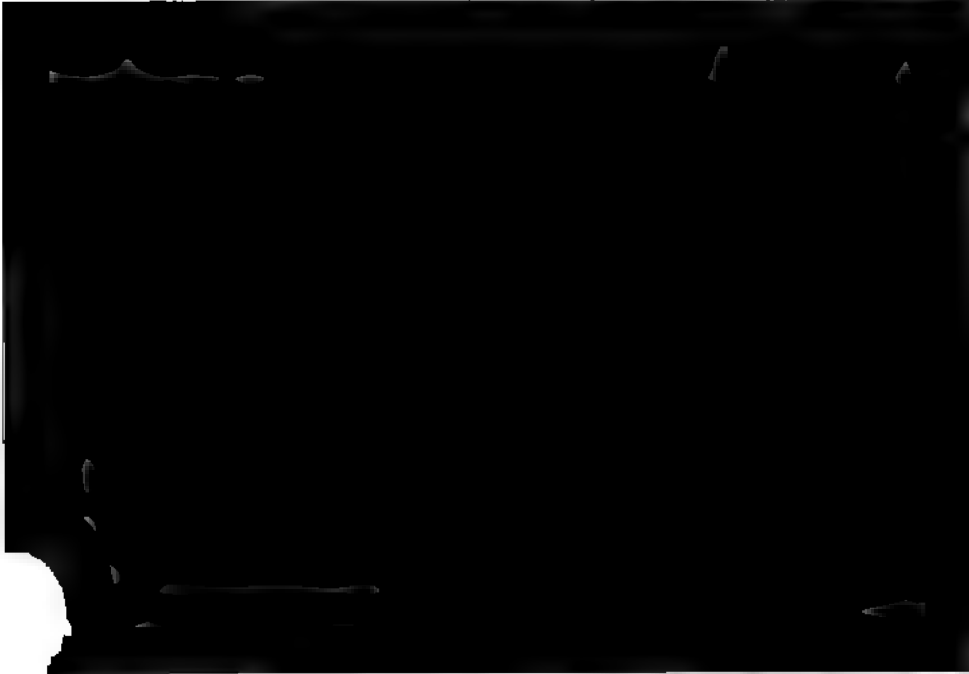
ther, having regard to what took place before March, 1847, the defendant ratified the act of his agents.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a rule for a new trial. The cause was tried before my Brother *Martin* at the Sittings at Guildhall after Michaelmas Term last, when a verdict was found for the plaintiff. The rule was obtained on the ground of alleged misdirection. There were two objections insisted on: first, that the defendant was not liable to the demand at all; secondly, that the action was brought too soon.

The circumstances were these:—The defendant had chartered a ship from the plaintiff to bring home a cargo of merchandise from Bombay, at the rate of 3*l.* 5*s.* per ton. The charterparty was one made by the defendant, not for the purpose of bringing home any cargo of his own, but to use the vessel as a general ship. The ship was at Bombay, and cargo was put on board by the agents of the defendant, sufficient, as the jury found, to fill all the carrying part of the ship. The captain of the ship then proposed to fill the cabin, and bring cargo to England in it. There was contradictory evidence, between the captain and one



bills. The ship arrived safely in England on the 30th of October, 1847, and the goods were put into a warehouse under a stop for freight. After the arrival, the plaintiff demanded payment at the rate of 7*l.* per ton. The defendant refused to pay, insisting that he was entitled to fill the cabin as well as any other part of the ship, at the rate of 3*l.* 5*s.* per ton. He himself charged his agents in his accounts with the freight after the rate of 7*l.* per ton for these goods, and allowed them commission for procuring the freight for him at the rate of 7*l.* The dispute continuing, this action was brought, and the defendant paid money into Court, paying for the cabin goods at the rate of 3*l.* 5*s.* per ton. At the trial, there was a question whether the goods could not have been brought home in the cargo part of the ship. The jury (as has been already observed) found this against the defendant, and no complaint is made at this finding. It was also contended, that the agents had no authority to make a contract for the defendant to bring home their goods under the only authority which they possessed, viz. a letter from the defendant. The Judge was of this opinion; but he told the jury, that if the agents at Bombay, although they had no authority from the defendant, nevertheless acting as if they had, put the goods into the cabin, and the defendant, upon the arrival of the ship in England, took to these goods as goods brought home in the ship, to the freight of which he was entitled, he was bound to pay the plaintiff the rate of freight payable at that time for goods from Bombay to England; and that the plaintiff was not confined to the chartered rate of 3*l.* 5*s.* per ton.

We think the direction perfectly right. The defendant was not entitled under the charterparty to fill the cabin at all, but he insisted upon taking and did take the benefit of it, and actually got paid 7*l.* per ton in respect of the freight of goods carried home in it. It is true, he insisted

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NICHOL.

that he had a right to have the benefit of the cabin at 3*l*. 5*s*. per ton, but he was in error, and had no such right. The plaintiff insisted that he was entitled to have paid to him 7*l*. per ton, which he alleged the authorised agents for the defendant at Bombay contracted to pay. But he also was in error, because we think the agents at Bombay were not authorised to make the contract, even if they did make it, as to which there was contradictory evidence. What is then the legal consequence? Why, that the defendant must pay, in respect of the benefit obtained by him, the fair value of such benefit, or, in other words, the current rate of freight at the time of the loading on board at Bombay, which is what the jury have found him to be liable to, under the direction of the Judge.

The second objection was, that the action was brought too soon. This arose upon a piece of evidence given by the plaintiff, as follows:—The bill of lading, as has been observed, was pledged to the East India Company. After the action was brought, the bill of exchange having been paid, the defendant obtained possession of the bill of lading from the East India Company, and the goods were transferred to his name at the dock warehouse; and it was insisted that, until he got possession of the goods, he was not liable, and that at all events there was a misdirection



the jury, and we think that the jury acted under no misapprehension on the subject.

The rule will therefore be discharged, and our judgment will be for the plaintiff.

Rule discharged.

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NICOL.

MEMORANDUM.

IN the following Vacation, *Robert Matthews* and *Ralph Thomas*, of the Middle Temple, Esquires, were respectively called to the degree of the coif, and gave rings with the motto "*Hoc age.*"



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TO THE

PRINCIPAL MATTERS.

ACCOUNT STATED.

See LEGACY.

AFFIDAVIT.

See INSPECTION OF DOCUMENTS, (2).

Semble, that an affidavit sworn before the Deemster in the Isle of Man cannot be used, unless it be shewn that he has power to administer an oath. *Cross v. Cheshire*, 43

AGREEMENT.

See CONSIDERATION.

PARTIES TO ACTION, (2).

ANNUITY.

See MONEY PAID, (1).

APPEAL.

See COUNTY COURT (3). 3.
POOR RATE.

ARBITRATION.

See EVIDENCE, (6).

(1). *Enlargement of Time*.

A cause was referred to arbitra-

tion in 1846; the parties delayed to proceed with the reference, and the arbitrator did not enlarge the time beyond Easter Term, 1850. The Court refused to enlarge the time under the 3 & 4 Will. 4, c. 42, to Michaelmas Term, 1852, the defendants refusing to accede to such enlargement. *Andrews v. Eaton*, 221

(2). *Validity of Award*.

1. Upon a reference by a Judge's order, where the costs of the reference and award are to be in the discretion of the arbitrator, and the order contains the usual clause, that the order may be made a rule of Court, and the order is afterwards made a rule of Court, and the arbitrator awards the costs to be paid by one of the parties, *to be taxed by an officer of the Court*, the award is good, although no cause was pending at the time of the order of reference.

Where one of the matters in difference between A. and B., the parties to a submission to arbitration, was, whether at the time of the submission on a day therein named, a copartnership existed between them;

respect of profits:—*Held*, that, as the arbitrator did not find whether the copartnership did exist or not, the award was bad. *Bhear v. Haradine*, 269

2. A., on the one part, and B. & C. on the other, mutually referred their differences to two arbitrators, who awarded de præmissis that B. should pay to one of the arbitrators a sum of money, and that he should immediately on receipt thereof pay it over to A.:—*Held*, in the Exchequer Chamber, that, if the subject-matter of the award was a separate difference, it was clearly good; and that, if it was a joint matter, the award was good as regards B., since he could not object to the omission to adjudicate on C.'s liability.

Also, that the direction to pay the money to the arbitrator did not vitiate the award, as it sufficiently appeared that the payment was for the benefit of one of the parties. *Wood v. Adcock*, 468

3. Where matters in difference in a cause involving several issues are referred to arbitration, the costs of the cause to abide the event, the award is good notwithstanding there is no specific finding on each issue, if it appear by necessary intendment that

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sheriff's officers; on the following day, the interpleader summons was heard and dismissed, on the ground that the goods were not in the sheriff's possession. The claimant was, in fact, entitled to the goods under a bill of sale.

On motion for an attachment against the claimant for a contempt of Court in carrying away the goods:—*Held*, that he was justified in so doing, the goods being his property, although the interpleader summons was not disposed of.

A sheriff who intends to levy may, before actual seizure, apply for relief under the Interpleader Act. *Day v. Carr*, 883

2. The governor of a prison, in compliance with an order of the visiting justices, refused to allow the process of this Court to be served upon a prisoner undergoing a criminal sentence. The Court granted a rule nisi for an attachment against the governor, on the condition that the rule was not to be served or acted upon, unless he persisted in refusing to allow service. *Danson v. Le Capelain*, 667

ATTORNEY.

See PLEADING, I. (1).

(1). *Payment of Money pursuant to Undertaking.*

A., an attorney, having been employed by a former client of B., in consideration of the latter handing him over the papers in the cause, wrote as follows:—"Out of any monies which I may receive on this or any other proceeding on the plaintiff's account, I will hand you such balance as may remain due of your bill of costs, as settled at 9*l*.:—*Held*, that A. was bound to pay B. out of the first monies A. received on account of the

client, and not out of the surplus after deducting his own costs. *Tharratt v. Trevor*, 161

(2). *Obligation to carry on Suit.*

As a general rule, an attorney or solicitor, retained to conduct a suit, is under the obligation to carry it on to its termination, and he cannot sue for his bill of costs until that period has arrived. He may, however, give a reasonable notice to his client to supply him with adequate funds; and, in case of refusal, he may sue him for his costs. The retainer is also determined by the death of the client.

A solicitor was retained in a Chancery suit in which his client was a defendant, and an order was made by the Court that a supplemental bill should be filed, to make certain persons, next of kin, parties to the suit; no decree was ever made, nor was there any further step taken in the suit. Upwards of ten years after this order had been made, the solicitor's client died:—*Held*, in an action by the solicitor against the representative of the client for his bill of costs up to the time when the order was made, that the debt was not barred by the Statute of Limitations. *Whitehead v. Lord*, 691

(3). *Privileged Communication.*

1. The plaintiff was employed by the defendant as her attorney in winding-up the affairs of her late husband, of whom she was executrix. In the course of that business, the plaintiff requested the defendant to let him have a statement of the debts of her late husband, and what had been paid, in order to prepare a case for counsel. The defendant, in consequence, sent to him an account-book, which contained an item of interest paid on a promissory note given by

ception of evidence depends on a preliminary question of fact. *Cleave v. Jones*, 421

2. The relation of attorney and client prevents the former from disclosing any communication made to him in the ordinary course of his employment, and on the faith of the confidence which the client reposes in his legal adviser. But the privilege does not extend to matters of fact, which the attorney knows by any other means than by confidential communications with his client, though, if he had not been employed as attorney, he probably would not have known them.

Thus, in an action on a bill of exchange, to which the defendant pleaded that the bill was given for a gaming debt; and it was deposed, that the only bill which had been given by the defendant was that upon which the action was brought; and, after a request then made to the plaintiff to produce the bill, the plaintiff's attorney was called on the part of the defendant, and asked whether he then had the bill with him in Court:—*Held*, that the attorney would not be guilty of any breach of professional confidence in answering the question, and that it was admissible. *Dwyer v. Collins* 826

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ed the timber to the purchasers. The adjudication was not notified in the Gazette until the 13th of February, 1849:—*Held*, first, that the issuing of the fiat was not of itself notice of the act of bankruptcy; and secondly, that, by the words in the 84th section of the 6 Geo. 4, c. 16, “goods belonging to any bankrupt,” are to be understood goods which belonged to the bankrupt at the time they were deposited in the possession or custody of the person or body corporate delivering them, and which goods would have continued to be his property, if an act of bankruptcy had not occurred; and therefore that the defendants were protected by that section, as they had delivered the goods without notice of the act of bankruptcy.

The declaration stated that the creditors’ assignees were possessed of the goods at the time of the alleged conversion:—*Quære*, whether such allegation was supported by evidence, which shewed that, at the time, the creditors’ assignees had not been appointed. *Cannan v. The South-Eastern Railway Company*, 843

BILL OF EXCHANGE.

See LANDLORD AND TENANT, (5).
USURY.

Notice of Dishonour.

In an action by the first indorsee of a bill of exchange against the drawer, it was proved that the plaintiff wrote a letter to the defendant, stating the bill to be dishonoured, and requiring payment, but the letter misdescribed the bill as drawn by J. H. (the acceptor), and accepted by the defendant:—*Held*, that the letter contained a sufficient notice of dishonour. *Mellersh v. Rippen*, 578

BILL OF LADING.

See CARRIER, (2).
CONSIGNOR AND CONSIGNEE.

BILL OF SALE.

See INSOLVENT DEBTOR, (3).

BOND.

See COUNTY COURT, (5).

In an action against the Westminster Improvement Commissioners, the declaration stated, that the defendants, by their writing obligatory, acknowledged that they, by virtue of the Westminster Improvement Acts, 1845 and 1847, were bound to P. in a certain sum, subject to a condition for repayment, which recited “that by virtue of the said Acts, the defendants were authorised to borrow any sum of money for the purposes of the Acts, and to secure the same by their bonds; and that the defendants, in pursuance of the Acts, had borrowed of P. 5000*l.*, for enabling them to carry the purposes of the Acts into execution.” The declaration then stated, that P., according to the provisions of the Westminster Improvement Act, assigned the bond to the plaintiff; and alleged as a breach the nonpayment to the plaintiff of interest. Seventh plea, that the defendants did not, in pursuance of the said Acts, borrow of P. the said sum for enabling them to carry the purposes of the Acts into execution, nor was the same lent by P. for that purpose; and that the writing obligatory was not made by the defendants for securing the payment of any sum of money borrowed by the defendants for the purposes of and under the powers and provisions of the Acts. Eighth plea, that C. M. and W. M. were entitled to receive from the defendants certain bonds;

then, that P. and A., in further
 pursuance of the conspiracy, and by
 means of the said fraud and covin,
 did cause and procure C. M. and
 W. M. to request and direct the de-
 fendants to make and deliver the
 bonds to which C. M. and W. M.
 were so entitled, and amongst others
 the bond in the declaration mention-
 ed, to P. as the obligee thereof, in-
 stead of C. M. and W. M. That P.
 and A., in further pursuance of the
 conspiracy, and by means of the fraud
 and covin, caused and procured the
 defendants to deliver the bond in the
 declaration mentioned to P., of which
 premises the plaintiff had notice; and
 that afterwards, C. M. and W. M.
 required the plaintiffs not to pay the
 bond. General demurrer to these
 pleas:—*Held*, that the seventh plea
 was bad, on the ground, first, that
 the Westminster Improvement Act,
 1845, enabled the Commissioners to
 borrow any sum of money which
 "they should judge necessary for the
 purposes of the Act." Secondly,
 that the defendants were estopped
 by the recitals of the bond from de-
 nying that the money was in fact
 borrowed for those purposes.

Held, also, that the eighth plea
 did not disclose any defence at law
 to the action. but that the only re-

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the proportions out of the poor rates made and collected, or to be made and collected. A warrant was issued by the defendants, one of whom was the Mayor of Lichfield, and both justices of the borough, against an overseer who had not paid the proportion assessed in his parish. This warrant contained the venue in the margin, and directed a certain sum to be levied by distress of the plaintiff's goods, and provided, that "if, within the space of five days next after such distress by you taken, the sum of &c. shall not be paid, then you do sell the said goods;" and concluded thus:—"Given under our hands and seals, and under the corporate seal of the said borough and city. T. T. (L. s.), M. B. M. (L. s.), Justices of the said borough and city; Thomas (corporation seal) Johnson, Mayor." The defendant Johnson was not stated in the body of the warrant to be mayor of the borough:—

Held, on error, by the Court of Exchequer Chamber:

First, that the rate was valid; as a borough rate need not be made in public.

Secondly, that the items of 105*l.* and 800*l.* could not be considered as *by-gone expenses*, so as to make the rate retrospective with regard to them, as the questions relating to the first item were under litigation at the time of the making of the rate; and that, as to the second item, the council were justified in treating such expenses as not actually incurred before the delivery of the solicitor's bill; and as the rate was good upon the face of it, and the overseer (the plaintiff) had not appealed against it, he could not object to it as against the defendants.

Thirdly, that the variance between the precept of the treasurer and the warrant of the mayor as to the time of payment was immaterial; and, at all events, that the plaintiff could not

complain of it, as he had thereby a further time for payment given him.

Fourthly, that the plaintiff was liable to have his goods seized as a distress, although he was out of office before the distress warrant was executed, as he was the offender under the 55 Geo. 3, c. 51, which provides that the offender's goods shall be seized, and gives the existing overseers power to make a rate to reimburse him.

Fifthly, that the fact of the warrant of distress being under the hands and seals of the two defendants as justices, did not prevent the warrant from being the warrant of one of them as mayor, the warrant having his signature and the corporate seal attached to it. *Jones v. Johnson*, 452

(2). *County Gaol.*

The 4 Geo. 4, c. 64, s. 48, does not exempt a county gaol situate in a borough from borough rates. That section merely affects the jurisdiction of the county justices.

By 43 Geo. 3, c. cxxviii., s. 59, (An Act for the improvement of the town of Bedford), passed, inter alia, for the purpose of keeping the streets of the town in repair and lighted, a certain sum was to be assessed upon all halls, gaols, churchyards, &c., within the town of Bedford, "for every yard running measure of the length in front of such halls, gaols," &c.:—

Held, that, notwithstanding the 4 Geo. 4, c. 64, s. 48, the county gaol was liable to the payment of the rate; and that every part of the building which abutted on a public street was to be included in the measurement; and therefore, that the sides and back parts of the gaol which abutted on public streets were to be included in such calculation. *The Justices of Bedfordshire, Appellants, v. The Commissioners for the Improvement of Bedford, Respondents*, 658

tributions, stood within its own grounds, the principal entrance to which was on the south east side from a public highway; there was also an entrance on the north west side from a public road by a private avenue through pasture land not occupied by the governors of the Infirmary, and on the north east side it was bounded by a public footway which extended beyond its grounds along the pasture land up to the above-mentioned public road, but there was no entrance from this footway to the Infirmary:—*Held*, first, that the Infirmary was a “public building” within the meaning of the statute; secondly, that the rate ought to be assessed according to the running measure on the whole of the south east side, and on so much of the north east side as the footpath extended in front of the grounds of the Infirmary, but not beyond, or on the north west side. *Governors of Bedford Infirmary, App. v. Commissioners of Bedford, Resp.*, 768

(4). *Union Workhouse.*

The 34 Geo. 3, c. xcvi. enabled the directors of the poor of Bedford to erect a workhouse, and enacted, that all buildings erected by virtue

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house at Brompton. The defendants made one entire charge for the carriage from Bristol to Brompton:—*Held*, that the defendants were not liable for the damage; and consequently, a declaration, which stated that they as common carriers received the goods to be carried from Bristol to Brompton, could not be supported. *Fowles v. The Great Western Railway Company*, 699

2. A contract entered into with a common carrier by the party who delivers goods to be conveyed, by which contract the carrier is exempted from all liability for any loss occasioned by his negligence, is binding upon both parties.

A declaration stated, that the defendants were the owners of a certain Railway, and that they conveyed horses and cattle thereon as common carriers; that the plaintiff delivered to the defendants a horse, to be carried by them for hire on their Railway from A. to B, subject to certain conditions assented to by the plaintiff, and contained in a notice at the foot of the ticket of the defendants' Company for the conveyance of the horse; which ticket stated that it was issued subject to the owner's taking all risks of conveyance whatsoever, as the Company would not be responsible for any injury or damage (howsoever caused) occurring to live stock travelling upon their line. The declaration then stated, that, whilst the horse was in the custody of the defendants, it was injured by the horse-box, in which the animal was, being propelled against some trucks, through the gross negligence of the Company:—*Held*, that the defendants had engaged to carry the plaintiff's horse under a special contract, the terms of which were contained in the notice; and that, by that notice, the plaintiff had agreed that the defendants should not be responsible

for such a loss, although it were occasioned through their negligence; and consequently, that the declaration was bad after verdict.—*Platt, B., dubitante. Carr v. The Lancashire and Yorkshire Railway Company*, 707

(2). *Meaning of Exception as to "Robbers, Dangers of Roads," &c.*

The defendants received from the plaintiff at Panama certain goods to be delivered in London, "the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads, and rivers, of what nature or kind soever, excepted." The goods were carried by the defendants across the Isthmus of Panama to Chagres, where they were shipped to Southampton, and there placed in a railway truck, from whence they were secretly stolen in the course of their transit to London:—*Held*, that this was not, within the exception, a loss by "robbers," or by "dangers of the roads;" since the word "robbers" meant, not "thieves," but robbers by violence; and "dangers of the roads" meant dangers of marine roads; or, if of land roads, such dangers as are immediately caused by roads, as the overturning of carriages in rough and precipitous places. *De Rothschild v. The Royal Mail Steam Packet Company*, 734

CERTIORARI.

See COUNTY COURT, (4). 4.

A plaint having been entered in a county court, in which the plaintiff claimed "50*l.* for money had and received, &c., and on an account stated," the defendant removed the cause into the superior Court by certiorari, obtained upon an affidavit, which stated that difficult questions of law would

the claim to be for a specific and liquidated account; and secondly, that the Court could not decide upon motion a question which was disputed by the affidavits. *Ross v. Williams*, 51

CHARTERPARTY.

See PRINCIPAL AND AGENT.

CHEQUE

The crossing of a cheque payable to bearer with the name of a banker, whether made by the drawer or the bearer, does not restrict the negotiability of the cheque to such banker, or to a banker only; but is a mere memorandum that the holder is to present it for payment through some banker.

Such crossing is made as a protection to the owner of the cheque; and the payment of a crossed cheque otherwise than through a banker, would be strong evidence of negligence, if the party presenting the cheque proved not to be the lawful owner of it.

In an action against a banker for money lent, to which the defendant pleaded payment, it appeared that the plaintiff had drawn on the defendant a cheque, and crossed it thus—
“Bank of England for account of the

peared that the plaintiff would not be able to prove that the cheque was not cashed in England:—
The defendant’s evidence of negligence was not sufficient to establish a defence of negligence. *L*

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The action was for the sole and entire consideration of two or more persons, and the charge all the time. *Ly*

CONSIGN

In 1845 the plaintiff’s agents were appointed plaintiffs, and the following follows:—

“At the

consequence of this letter, two orders given by K. & L. were executed by the plaintiffs, who forwarded the goods and bills of lading to the defendants, and they accepted and paid bills drawn on them in accordance with the letter. In February, 1847, K. & L. wrote to the plaintiffs, inclosing patterns for a third order, and saying, "You will draw for cost, and consign goods as before." The plaintiffs executed this order, and on the 21st of August shipped the goods on account of K. & L., and sent to the defendants the invoice and bill of lading inclosed in a letter, saying, "We have as usual drawn upon you at six months for the equivalent of the amount of invoice." The bill of lading stated the goods to have been "shipped by the plaintiffs, and to be deliverable to the defendants or their assigns, on payment of freight." The invoice stated, that the goods were "consigned to the defendants on account and risk of K. & L." The letter containing the bill of lading and invoice was received by the defendants on the 26th of August, and the goods arrived in London on the 21st of October. On the same day, the plaintiffs' agent received a bill drawn against the goods, and caused it to be presented to the defendants for acceptance, but they refused to accept it. On the 27th of October K. & L. stopped payment. The goods were received by the defendants under the bill of lading, and sold, and the proceeds retained by them. On the 4th of March, 1848, the plaintiffs gave the defendants notice that they claimed to stop the goods in transitu, the defendants having refused to accept the bills; and the plaintiffs subsequently brought an action to recover the proceeds of the sale as money received for their use:—*Held*, first, that it was a question for the Judge, and not for the jury, to decide whether, under the

circumstances, the property in the goods vested absolutely in K. & L., or merely conditionally on the acceptance of the bill by the defendants.

Secondly, that the contract was not subject to the condition, either precedent or subsequent, that the defendants should accept the bill, but that the property in the goods vested absolutely in K. & L. upon the delivery on board the ship and transmission of the bill of lading to the defendants.

Also, that if the plaintiffs had intended to preserve their right of property in the goods until the bill was accepted, they should have transmitted the bill of lading indorsed in blank to an agent, to be delivered over only in case the bill was accepted. *Key v. Cotesworth*, 595

CONSTABLE

See WARRANT.

CONTRACT.

See CONSIGNOR AND CONSIGNEE.
PARTIES TO ACTION, (2).
RAILWAY COMPANY.

CORPORATION.

See RAILWAY COMPANY, (1).

COSTS.

See ARBITRATION, (2). 1, 3.
COUNTY COURT, (4).
INSPECTION OF DOCUMENTS, (4).
PRACTICE, (2), (6).

The sureties of a defendant, on the removal of an indictment for a misdemeanor by certiorari from the quarter sessions, where the defendant has been convicted, are liable to pay the prosecutor his costs, although there is no such undertaking in the condition of the recognisance, or di-

COUNTY COURT.

See CERTIORARI.
EVIDENCE, (6).
FRIENDLY SOCIETY.
NOTICE OF ACTION.

(1). *Jurisdiction.*

By a written agreement, the plaintiffs let to the defendant certain premises, at a rent of 20s. a-week, payable as demanded; four weeks' notice to quit from any day to be sufficient. During the continuance of this tenancy, the plaintiffs verbally agreed with the defendant to accept 16s. a-week, which was accordingly paid, and, on two occasions, the defendant submitted to a distress for that amount:—*Held*, that no new demise was thereby created, and consequently the county court had no jurisdiction under the 122nd section of the 9 & 10 Vict. c. 95, the rent being above 50s. *Crowley v. Pitty*, 319

(2). *Abandonment of Excess.*

Where a plaintiff, having a cause of action to an amount exceeding

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The defendant submitted that there was no case for the jury, and that the plaintiff must be nonsuited. The plaintiff refused to be nonsuited; and the judge left it to the jury to say whether the liquor supplied by the defendant was of a marketable quality; and they found a verdict for the plaintiff. On appeal to this Court under the 13 & 14 Vict. c. 61, the case, which was stated by the judge, set out his direction to the jury, though not necessary to render intelligible the points of law which he formally submitted for the opinion of the Court:—*Held*, in answer to the questions so submitted, first, that the term "nonsuit" in the 9 & 10 Vict. c. 95, has the same meaning as in ordinary legal proceedings; and consequently that the county court judge had no power to nonsuit the plaintiff against his will, but, in the absence of any case for the jury, should have directed a verdict for the defendant.

Secondly, that the same rule of construction should be applied to the summons and particulars in the county courts as in the superior Courts; and therefore, in this case, the summons and particulars sufficiently described the cause of action, as the defendant could not have been misled by them; and that evidence as to the quality of the beer was admissible under them.

Held, also, that, under the 13 & 14 Vict. c. 61, ss. 14, 15, the Court of appeal is not confined to the precise questions submitted to them, but may decide upon the whole case as stated; and therefore, looking at the summing up in this case, it was erroneous; for the circumstance of the defendant having on one or two occasions supplied the plaintiff with bad beer, did not authorise him to avoid the contract, but he should have returned the beer, and, if better were not sent instead of it, he might, on the par-

ticular occasion, procure some elsewhere; and if the defendant continued to send bad beer, he might sue him on the implied contract that he would supply beer reasonably fit to be drunk. *Standish, App.; Clarke, Resp.*, 439

(4). Costs.

Power of Judge to certify.

1. Under the 12th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, a Judge has power to certify for costs, where the sum recovered in actions of contract is 20*l.*, and in tort 5*l.* *Garby v. Harris*, 591

Costs on Appeal.

2. In an appeal from the county court, as a general rule, the successful party is entitled to costs. *Robinson v. Lawrence*, 123
Hunt v. Wray, 125, n.

3. Where the plaintiff, before verdict, applied to be nonsuited, which the Judge refused, but stated that he would give the plaintiff leave to move to set aside the verdict and to enter a nonsuit, and the plaintiff, without moving in pursuance of such leave, appealed against the decision, the Court allowed the plaintiff the costs of the appeal. *Outincaite v. Hudson*, 380

In Cases of concurrent Jurisdiction.

4. Where the superior Courts have a concurrent jurisdiction with the county courts under the 128th section of the 9 & 10 Vict. c. 95, or in cases where no plaint could have been entered in any county court, or where the cause is removed from the county court by certiorari, the superior Court or a Judge thereof is bound by the 13 & 14 Vict. c. 61, s. 13, on being satisfied that the case falls within the 128th section, to make an order that

the plaintiff, who has recovered less than 20*l.* in a superior Court, shall recover his costs. *Asplin v. Blackman*, 386

5. The plaintiff and defendant, who dwelt less than twenty miles apart, entered into a written agreement, by which the former engaged to supply the latter with goods of a certain quality and at a specified price. After the delivery of a portion of the goods, the defendant refused to take the remainder, on the ground that they were not of the quality agreed upon. The plaintiff thereupon sued the defendant in one of the superior Courts, to recover the amount of the goods so delivered; and, at the trial, he gave in evidence the written agreement, and recovered a verdict for the amount of the goods supplied at the price stated in the agreement. This agreement was executed by both parties, at a place within the jurisdiction of a court within which the defendant dwelt at the time of action brought, and the amount recovered was below 20*l.*:—*Held*, that this was not a case in which the superior Court had concurrent jurisdiction, and therefore, that the plaintiff was not entitled to costs. *Norman v. Marchant*, 723

COVENANT.

that the preliminaries required to be observed by the 121st and 127th sections were not conditions precedent to the validity of the bond, and that it was valid as a voluntary bond.

Secondly, that the irregularity in the proceedings, in not removing the suit by a certiorari founded on a proper bond, had been waived by the proceedings taken in the Court above.

Thirdly, that the obligee of the bond was entitled to recover in the action upon it, as trustee of the party for whom he took it, all the costs incurred by the latter in the replevin suit. *Stansfeld v. Hollonwell*, 373

COVENANT.

See LEASE.

RAILWAY COMPANY, (3).

An indenture of lease, by which certain coal-mines in the North of England were demised for the term of forty-two years, contained the following covenant by the lessees:—
"And also, that they the said lessees, their executors, &c., or their servants or workmen, should and would once in every month, or oftener, during the said term, at their own expense, draw to bank at some of the pits or shafts of the said col

so much thereof, and of all such dung, manure, compost, &c., as should be made, bred, or arise in, under, or upon the said estate, lands, and premises of the said lessors, or any part thereof, as might be necessary for that purpose, in dressing and manuring any lands or grounds which they the said lessees, their executors, &c., or any of them, might, during the said term thereby granted, occupy as tenants to the said lessors or either of them, their or either of their heirs or assigns." The lease contained various clauses which spoke of the pits or shafts to be sunk on the demised premises, but did not contain any express covenant by which the lessees were either bound to sink a pit or to work the mines; and it was also doubtful whether the lessees were empowered to work the demised mines by "outstroke:"—*Held*, that no covenant could be implied from the preceding covenant, which imposed upon the lessees, upon the mines being worked and manure being made within them, the obligation of sinking a pit or shaft upon the demised lands, although they might be liable for a breach of covenant in working the mines by outstroke. *James v. The Hon. W. E. Cochrane*, 170

CUSTOM.

See SURVEYOR OF HIGHWAYS.

CUSTOM OF THE COUNTRY.

See LANDLORD AND TENANT.

DAMAGES.

See PLEADING, II. (3).

In case for selling goods distrained for rent without appraisement, the measure of damages is the real value of the goods sold *minus* the rent due.

If a Judge at Nisi Prius does not

inform the jury what is the proper measure of damages on an issue on which it is admitted that the plaintiff is entitled to a verdict and to damages, the Court will direct a new trial, although the point was not taken by the plaintiff's counsel at the trial. *Knight v. Egerton*, 407

DEMISE.

See LICENSE.

DEVISE.

See LEGACY DUTY.

(1). *Creation of Trust.*

A testator made his will in the following terms:—"I give and bequeath all my property, of whatsoever description, to my wife, for the maintenance of herself and our children" (naming seven in number), "and I constitute my said wife to be sole executrix of this my will," &c.:—*Held*, that a trust was thereby constituted for the benefit of the children, and that the executrix was bound to deliver an account to the Legacy Duty Office. *In re Harris*, 344

(2). *Duration of Trust.—Estate Tail.*

By a will (made before 1838) a testator devised as follows—"I give and devise to A., B., and C., and their heirs and assigns, all that (naming the premises), upon trust, nevertheless, to receive the rents and profits, and, after deducting all taxes and expenses whatsoever, to pay the same unto such persons and for such purposes as my daughter E. M. shall direct, and for want of such direction, to and for her sole and separate use; and from and immediately after the decease of my said daughter, upon trust, to pay and apply the said rents, &c. for and towards the maintenance and education of my said daughter's

children then living, during their minority; and upon the youngest living of my said daughter's children attaining the age of twenty-one, I give and devise the said house and premises unto all the children of my said daughter who shall be then living, in equal shares and proportions, share and share alike." In one of the devises contained in the will, an estate *in fee* was devised to the testator's grandson, on attaining twenty-one years; and by a concluding clause of the will, the testator, as to the residue of his estate not before specifically disposed of, devised and bequeathed the same to his eldest son, to hold to him, his heirs, executors, administrators, and assigns, according to the nature of the several estates, absolutely for ever; and the testator also authorised his trustees, at their discretion, from time to time to grant leases of any part of the premises in trust, for any term not exceeding twenty-one years, at the best rent that could reasonably be obtained, but without taking any fine for such leases:—*Held*, that the estate of the trustees and their heirs was to continue only for such time as the objects of the trust required it; and that the power to lease was a power only, to be exercised during the con-

in the parish of H., in the county of S., and in the occupation of myself, my son G. W., and W. J.—*Held*, that the son took an estate in fee-simple in the property. *Burton v. White*, 720

DISCLAIMER

See PATENT.

DISTRESS

See BOROUGH RATE, I.
DAMAGES.
PLEADING, II. (2), III.

EVIDENCE

See CHECK

PAYMENT.

PRINCIPAL AND AGENT.

(1). *Entries of Deceased Receiver*

On an issue as to the right of L. to a certain fishery, entries of a deceased receiver, charging himself with the receipt of rent from a sub-receiver, due from certain persons (of whom the sub-receiver was one), for fixing a net in the fishery, are evidence in support of L.'s right. *Parcial v. Nanson*,

taining by estimation 112 acres of arable, &c. lands, situate in the vill of Kernynyved, now or late in the tenure or occupation of David ap John ap David." In replevin of a distress for this rent, made in certain closes of a farm called Plas Bach, the defendant, for the purpose of proving that Plas Bach was parcel of the 112 acres of escheat lands out of which the rent issued, tendered in evidence the following Survey, from the office of Land Revenue Records:—"Lordship of Denbigh—Survey taken in the reign of Queen Elizabeth 11th. The Comot of Kynmerch. The presentment of the jury of survey for farm lands within the Comot of Kynmerch." Various townships were then mentioned, and amongst them Kernynyved; as to which it was stated, that David ap John ap David occupied certain parcels of land, and, amongst them, one messuage called "y Place Baghe," and in the margin were the words, "Acres 112, 1l. 3s. 4d." The defendants also gave in evidence the accounts of the Crown Ministers for the lordship of Denbigh, in the time of Elizabeth and James I., containing references to other parts of the Survey:—*Held*, that the Survey was not admissible in evidence. *Daniel v. Wilkin*, 429

(3). *Competency of Wife for or against her Husband.*

The 14 & 15 Vict. c. 99, has not rendered a wife a competent witness for or against her husband in civil proceedings.

Whether the testimony of a wife is admissible if the objection to her competency be waived, *quære*.

But where the objection is taken, and the Judge thereupon rules that the evidence is inadmissible, although the counsel for the opposite party is afterwards willing to waive the ob-

jection, the Judge is not therefore bound to admit the evidence. *Barbat v. Allen*, 609

(4). *Entry of Bailiff under Warrant.*

Trespass for breaking and entering the plaintiff's dwelling-house, and seizing his goods. Plea, that T. recovered a judgment against H., and thereupon issued a writ of *fi. fa.* directed to the sheriff, who made and delivered his warrant to the defendant, a bailiff, to be executed; by virtue of which writ and warrant the defendant, as bailiff, seized the goods of H. in the plaintiff's dwelling-house. Replication, that, although T. recovered judgment, and sued out such writ, and the sheriff made and delivered to the defendant such warrant as in the plea mentioned, nevertheless *de injuriâ absque residuo canonis*.—Issue thereon:—*Held*, that, on these pleadings, the judgment, writ, and warrant being admitted, there was, in the absence of proof to the contrary, evidence that the defendant entered under the warrant. *Richard Hewitt v. Macquire*, 80

(5). *Prior Authority or Ratification of wrongful Act.*

The plaintiff, being desirous of going by an excursion train from Monks Ferry (the defendants' station) to Bangor and back, inquired of the clerk at the former station by what train he could return; the clerk informed him that his ticket would be available by the evening train from Bangor: the plaintiff accordingly obtained an excursion ticket, and returned by the train mentioned, by the clerk. On arriving at the platform near to the Chester station, a railway servant, who had charge of the train, upon receiving the plaintiff's ticket, told him that he had come by the wrong train, and that

other railway Companies; but one of the witnesses stated that he believed the person who took the plaintiff into custody to be one of the servants of the defendants' Company. The plaintiff's attorney having written to the secretary of the defendants' Company for compensation, received a written answer from him, requesting that he might be furnished with the date of the transaction, and promising to make the necessary inquiries. The secretary also stated that it was an awkward business, and that the blame would fall upon the clerk at the station who had given the false information; and he also offered to repay to the plaintiff the sum of 2s. 6d. he had been compelled to pay: *Held*, in an action against the defendants for the arrest, that the circumstances of the case did not afford any evidence that the arrest had been made by any authority, either express or implied, given by the Company, or that they had ratified the act. *Roe v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, 38

(6). *Reference of Plaintiff in County Court.*

To an action of assumpsit for goods

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FACTORY ACT.

EXECUTION.

See SHERIFF.

EXECUTOR.

See ATTORNEY, (3). 1.

LEGACY.

MONEY PAID, (1).

FACTORY ACT.

(7 & 8 VICT. c. 15.)

1. *Held* in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that, under the Factory Act, 7 & 8 Vict. c. 15, s. 21, the occupier of a mill is only bound to provide a secure fence for the mill-gearing and machinery, and to keep up the fence when the parts required to be fenced are in motion for some manufacturing process. Therefore, where the declaration stated that the defendants were the occupiers of a building in which steam power was used to work machinery employed in manufacturing cotton, and in part of which building there was certain mill-gearing, being a shaft, which was worked and put in motion by the said steam power; yet the defendants disregarded their duty in this, that the shaft was not securely fenced, contrary to the form of the statute, whereby the plaintiff received great bodily injury, &c.; such declaration was held bad in arrest of judgment, for not shewing that, at the time of the accident, the machinery was in motion for some manufacturing process. *Coe v Platt*, 460

2. The machinery of a cotton factory was worked by a steam-engine, which drove an horizontal shaft, passing along the lower floor of the factory. This horizontal shaft moved several vertical shafts which passed through the upper floors, and worked the machines by which the cotton was manufactured in the different rooms of the factory. One of these vertical

FOREIGN JUDGMENT. 959

shafts had its fencing removed for the purpose of repair, and all the machines which were worked by this shaft were at rest; but the vertical shaft itself revolved, and the process of manufacture continued to be carried on in the other rooms of the factory:—*Held*, that the master of the factory was not liable under the 21st section of the Factory Act, 7 & 8 Vict. c. 15, for an accidental injury occasioned to a little girl, in the room where no manufacturing process was being carried on, by the revolution of this vertical shaft. *Coe v. Platt*,

923

FEME COVERT.

See FINES AND RECOVERIES ACT.

FINES AND RECOVERIES ACT.

(3 & 4 WILL. 4, c. 74.)

A deed, executed by a married woman, to pass real estate, and indorsed with a memorandum of acknowledgment before a Judge, &c., under the 84th section of the 3 & 4 Will. 4, c. 74, is not effectual, unless a certificate of that acknowledgment be filed of record in the Court of Common Pleas, as required by the 85th section. *Jolly v. Hancock*, 820

FISHERY.

See EVIDENCE, (1).

FOREIGN JUDGMENT.

To an action on a judgment of the Supreme Court of the colony of the Cape of Good Hope, the defendant pleaded in bar, that, before the recovery of the judgment, by an Ordinance of that colony relating to the administration and distribution of insolvents' estates, it was enacted, that the Supreme Court might, upon petition of the insolvent, accept the

proceedings therein upon any order being made for the sequestration of such estate, should be stayed. The plea then stated the petition of the defendant, the surrender of his estate, that it had been placed under sequestration, that the plaintiffs proved the amount of the said judgment against the defendant's estate, that the estate was distributed, and that the plaintiffs received 1s. 6d. in the pound on the amount of the said judgment debt:—*Held*, that the plea was bad.
Prith v. Wollaston, 194

FRAUD.

See **BOND.**

FREIGHT.

The defendant, a merchant in London, chartered a vessel of the plaintiff's to bring from Bombay a full and complete cargo at 3*l.* 5*s.* per ton. The defendant's agents at Bombay filled the carrying part of the vessel, and also the cabin, with their own goods, and consigned them to the defendant as their factor for sale. There was contradictory evidence as to the terms upon which the cabin was filled. The bill of lading was annexed to a bill of exchange, drawn by the agents upon the defendant, which bill

and obtained.
 —*Held*, not, unless party, &c

Secondly directed defendant no authority put goods defendant accepting agents was bound to receive loading.

Thirdly not bringing to obtain defendant actual payment.
Mitchell

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By the Society any disbursements of trustees committed to such society should

tion of either party, to the judge of the county court.

Where, by the rules of a friendly society, disputes between members and the trustees may be referred to the arbitration of a certain number of the committee, a dispute, which affects the interests of all the individual members of the society, arising between some of its members, who are also members of the committee, and the trustees, where the question is not one which necessarily requires that recourse should be had to a Court of equity, such dispute cannot be referred to the judge of the county court, but must be referred to other members of the committee.

Where a dispute arose between two of the members of the committee of a friendly society and the trustees, touching the distribution of a fund in the hands of the latter; and by one of the rules of the society, it was ordered that disputes were to be referred to such members of the committee as should not be personally interested in the matter:—*Held*, that the judge of the county court had no jurisdiction in such case; and the Court granted a prohibition against further proceedings in a plaint issued out of the court over which he presided. *Grinham v. Card*, 833

GAOL.

See BOROUGH RATE, (2).
POOR RATE.

GUARANTEE.

See POLICY OF GUARANTEE.

(1). *Extent of Liability.*

Assumpsit by the plaintiff against the defendants jointly, upon the following guarantee:—"In consideration that you will sell to Mr. F. the

distillery, situate at &c., and will take Mr. F.'s acceptance, to be dated 29th of September, 1849, for 400*l.*, (the amount of the purchase-money), and interest, payable at six months after the date, we undertake and guarantee that the said sum of 400*l.* and interest shall be duly paid to you when the said acceptance arrives at maturity, in the proportion of 200*l.* each:—*Held*, that the defendants were severally liable to the plaintiff to the extent only of 200*l.* each. *Fell v. Goslin*, 185

(2). *Memorandum within the Statute of Frauds.*

The plaintiff, at the request of the defendant, sold to C. some wine, to be paid for by bills, and received from the defendant the following guarantee, signed by him:—"Upon your handing me your two drafts upon C. respectively for 200*l.* and 146*l.* at six months from this date, I undertake to get them accepted by him, and to see that they are duly paid." It was afterwards discovered that the draft for the wine mentioned as for 146*l.* should have been for 150*l.*; and accordingly the plaintiff drew bills for 200*l.* and 150*l.*, which the defendant got accepted by C., and gave to the plaintiff, and then wrote across the guarantee as follows:—"I have received the two drafts (one being for 150*l.* instead of 146*l.*, there being an error in the invoice of 4*l.*), both accepted by C." The plaintiff signed this receipt, but not the defendant. The plaintiff having declared on the above instrument as a contract, in consideration that the plaintiff would, at his own expense, procure stamps for and draw two bills, one for 200*l.* and the other for 150*l.*, at six months, and deliver them to the defendant, he would get them accepted and see them paid:—*Held*,

HARBOUR COMMISSIONERS.

(55 Geo. 3, c. clxxxiii.).

(1).

The 55 Geo. 3, c. clxxxiii. authorises certain Harbour Commissioners to charge a sum "not exceeding 1*d.* for every ton or less quantity than a ton, and for every package and parcel of goods, wares, merchandise, &c., exported or imported over the bars of certain rivers." Tin-plates were exported, packed in wooden boxes for shipment, and such boxes formed part of and composed one entire quantity or shipment in one vessel (under one bill of lading), and to the same consignee, and at an uniform rate of freight on all the tin plates so shipped, such freight being paid on the quantity of tons weight:

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(2).

—*Held*, that the Commissioners were entitled to charge 1*d.* per package, and were not bound to charge 1*d.* per ton weight. *Jones v. Phillips*, 85

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HUSBAND AND WIFE.

See EVIDENCE, (3).

INDICTMENT.

made at any time prior to three months before the filing of the petition, and not with the view or intention, by the party so conveying, assigning, &c., of petitioning the Court for protection from process. Where a voluntary conveyance or assignment, &c., is made by a person in insolvent circumstances three months before the filing of the petition, in order to render such conveyance or assignment, &c., void and fraudulent within the meaning of that section, proof must be given that *at the time* the party made the conveyance or assignment, &c., he had the definite view or intention of petitioning the Court for protection. *Thoyts v. Hobbs*, 810

(3). *Sale of Goods, after Petition for Protection under 7 & 8 Vict. c. 96.*

A. B., by deed, in consideration of certain prior advances, and of a further sum agreed to be advanced, bargained, sold, and assigned all his household furniture and other personal effects to the defendant, to hold absolutely as his own property, with a proviso, that, if A. B. should pay the money due on a day therein named, the deed should be void. The deed further provided, that, on default made in payment on the day named, the defendant should take possession, hold, and enjoy the property, and should, at his discretion, sell and retain the proceeds in trust to pay himself the sums due, and to pay the surplus, if any, to A. B.

A. B. made default in payment on the day specified, and the defendant took possession of the goods. A. B. afterwards filed his petition for protection under the 7 & 8 Vict. c. 96; and the defendant, after A. B. had filed his petition, sold the goods included in the deed:—*Held*, in an action by the assignees of A. B. against

the defendant, for the proceeds of the sale, that, as the bill of sale was absolute before the filing of the petition, the defendant had not “availed himself” of it under the 7 & 8 Vict. c. 96, s. 21, by the sale after the filing of the petition, and therefore that the assignees were not entitled to recover. *Simpson v. Wood*, 349

(4). *Certificate to Petitioning Trader under the 12 & 13 Vict. c. 106, s. 221.*

A plea of a certificate granted by a Commissioner in bankruptcy to a petitioning trader, under the 221st section of the 12 & 13 Vict. c. 106, is bad, unless it avers “that the resolution or agreement has been carried into effect, and the creditors of the trader have been satisfied.”

Seem, also, that such certificate is binding on those persons only who are creditors at the time of the petition, and have had notice of the sittings of the Court, as required by the Act; and therefore, where a petitioning trader, being the acceptor of a bill of exchange, gave the requisite notice to the drawer of the bill, whom he supposed to be the holder, the certificate was invalid against an indorsee without notice, who was in truth the holder, notwithstanding the trader had no means of ascertaining that fact. *Allcard v. Wesson*, 753

(5). *Misdescription in Schedule.*

Scire facias on a judgment. Plea, that, after the recovery of the judgment, the defendant was a prisoner, and, according to the provisions of the 3 & 4 Vict. c. 107, petitioned the Insolvent Court for his discharge; that the Court made an order, vesting his estate and effects in the provisional assignee; and that, afterwards, the defendant delivered to the Court a schedule, containing a full and true description of all debts due

dule; and that the defendant was, by such order of adjudication, discharged from the said judgment debt. Replication, that the defendant was not by the order of adjudication adjudged or ordered to be discharged from the said debt:—*Held*, that, upon these pleadings, the objection was not open that the schedule did not contain a full and true description of the plaintiffs as judgment creditors, nor of the nature and amount of their debt. *Jackson v. Chichester*, 877

INSPECTION OF DOCUMENTS.

(1). *Power of Court, independently of the 14 & 15 Vict. c. 99.*

The Court has power, independently of the 14 & 15 Vict. c. 99, to compel the plaintiff to produce for the defendant's inspection a document upon which the action is brought, where the defendant is a party to the document and has no copy of it. *Bluck v. Gompertz*, 67

(2). *Affidavit in Support of Application.*

1. In an action against a director of a Joint-stock Company completely registered, for services rendered to

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2. In in resp in whic ed seve plied, u s. 6, for docume the plai attorne purchas receive ed and represe stock, v the har culars c nish to divers tries, a in relat that it in orde defend just an state of

the plaintiff had delivered to the defendant two accounts relating to the matters in question; and that the deponent verily believed that neither the particulars of demand nor those accounts set forth the true state of the accounts between the parties, &c.; and that the application was made *bonâ fide*, &c.:—*Held*, that no ground was shewn for an order to inspect under the statute. *Sneider v. Mangino*, 229

3. The 14 & 15 Vict. c. 99, s. 6, has not given to Courts of common law the power of compelling a *discovery*, but only of allowing an *inspection* of documents, subject to the following limitations: First, there must be an action or other proceeding pending; secondly, the documents must relate to such action or other proceeding; and thirdly, the case must be one in which a discovery could be obtained in a Court of equity.

Where an inspection is litigated and the facts disputed, the application must be supported by an affidavit, shewing that an action or other proceeding is pending, and stating circumstances sufficient to establish, *primâ facie*, that the opposite party has in his possession or under his control documents relating to such action or other proceeding, and that the applicant would by bill or other proceeding in equity obtain a discovery and inspection of the documents.

The right of a plaintiff in equity is limited to a discovery confined to a question in the cause, and to such material documents as relate to the proof of the plaintiff's case on the trial; and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. Therefore, under the 14 & 15 Vict. c. 99, s. 6, the applicant must show, first, what is the nature of the

suit and of the question to be tried; and *semble*, he should also depose as to his having just ground to maintain or defend it: secondly, the affidavit ought to state with sufficient distinctness the reason of the application and the nature of the documents, in order to satisfy the Court or a Judge that the documents are required to enable the applicant to support his own case, not to find a flaw in his opponent's; and also that the opponent may admit or deny the possession of the documents, or excuse their production on the ground that they relate exclusively to his own case, or that he is privileged from producing them. To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them, or he may submit to shew part concealing the remainder, on affidavit that the part concealed does not in any way relate to the plaintiff's case.

Therefore, where, in an action by an architect to recover his commission for superintending the erection of certain buildings for the defendant, the affidavit, in support of an application to inspect the plaintiff's day-book or journal, alleged that the work was never done; that, if done, the charge was excessive, and also that it was done on the credit of another, not of the defendant; but the authority of that other to pledge the defendant's credit was not negatived:—*Held*, that this was a case in which the defendant would have a right to a discovery in equity; and therefore, although the affidavit was defective in the latter respect, the defendant was entitled to an inspection, to see if there were any entries relating to the work, and what price was therein charged. *Hunt v. Hewitt*, 236

made under the 14 & 15 Vict. c. 99, s. 6, for the plaintiff to inspect "The Book of Admissions, The Book of Entries, The Medical Visitation Book, The Case Book, and The Patients' Book," so far as related to the plaintiff. The Court also ordered inspection of the defendant's license, of the order and medical certificates under which the plaintiff was confined; also of all letters written by the plaintiff's wife and the Commissioners of Lunacy to the defendant, relating to the plaintiff. *Hill v. Philp*, 232

(4). *Costs.*

The costs of the inspection of documents, under the 14 & 15 Vict. c. 99, s. 6, must be paid by the party seeking it; but the costs of the application are costs in the cause. *Hill v. Philp*, 232

INSURANCE.

An insolvent debtor, who has in his possession goods which have vested in the provisional assignee under the 1 & 2 Vict. c. 110, s. 37, has nevertheless an insurable interest in such goods. *Marks v. Hamilton*, 323

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the usual power of sale by public auction or private contract, in the event of the nonpayment of the mortgage-money, contained a proviso and covenant by the mortgagee that no sale, or public notice or advertisement for any sale, should be made or given, nor any means be taken for obtaining possession, until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mortgagor. It also contained a covenant by the mortgagee for quiet enjoyment by the mortgagor, as tenant at will to the mortgagee, on the payment of a certain yearly rent by two equal half-yearly payments, but no livery of seisin was made to the mortgagor:—*Held*, that, under this deed, the mortgagor was tenant at will only to the mortgagee, and no tenancy from year to year was thereby created. *Doe d. Dixie v. Davies*, 89

(2). *Agreement for Future Lease—Surrender.*

Debt on an indenture for rent. Plea, that whilst the defendant was in the occupation of the demised premises, and before the rent became due, it was agreed between the plaintiff and the defendant, that the plaintiff should make certain alterations, and in consideration thereof the defendant should relinquish his interest under the indenture, and accept a fresh lease for seven years at an increased rent; and until such lease should be tendered to the defendant, he should hold the premises as tenant from year to year, at the increased rent: that the plaintiff executed the alterations; that the defendant relinquished his interest under the indenture, and held the premises under the agreement; and that no new lease was executed: by means of which

premises, the defendant became tenant from year to year, and all his interest under the indenture was surrendered to the plaintiff by act and operation of law. Replication, *de injuriâ*; and issue thereon:—*Held*, first, that the plea could only be proved by an agreement in writing, since the stipulation as to the yearly tenancy was part of the agreement for a future lease, and such agreement was required by the Statute of Frauds to be in writing.

Secondly—That, under such an agreement, there would be no surrender of the existing lease by operation of law until the new lease was granted. *Foquet v. Moor*, 870

(3). *Custom of the Country.*

The defendants' testator, being in possession of an estate, of part of which he was the owner, and another part of which consisted of Crown lands leased to him for a term, expiring on the 10th of October, 1849, contracted with the plaintiff for the sale to him of the former part, and, by agreement, demised to him the Crown lands for one year from the 29th of September, 1848; and the plaintiff agreed that he would abide by, perform, and keep all and singular the covenants and agreements contained in the Crown lease; and the testator agreed, that, in case he should be able to obtain a further lease from the Crown for fourteen years, he would grant to the plaintiff a lease for thirteen years, subject to the same covenants. By a memorandum subsequently signed by the plaintiff, he agreed to take (with others) the Crown lands, "subject to the same rents, covenants, and obligations, in all respects," as were contained and provided for in the leases by which the testator held, or should hold, the same. The plaintiff, on

that the custom of the country was not excluded by the agreement between the parties; secondly, that, where such a custom exists, there is an implied contract on the part of the landlord, that, if there be no incoming tenant, he will pay the outgoing tenant according to the custom.

Semble, that such a custom does not apply to cases where the term is put an end to by the determination of the landlord's interest. *Faviell v. Gaskoin*, 273

(4). *Right of Landlord to open Door in order to distrain.*

A landlord, in order to distrain, may open the outer door by the usual means adopted by persons having access to the building; and therefore he may open it by turning the key, by lifting the latch, or by drawing back the bolt.

Quere, where the outer door is broken open, whether the distress is void. *Ryan v. Shilcock*, 72

5). *Payment of Rent to Landlord by his Agent.*

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term, and consequently the defendant was liable on the covenants. *Cottee v. Richardson*, 143

LEGACY.

Among the papers of a testator were found two letters, sealed and directed "For S. G., my late servant." S. G. had been in the service of the testator as housekeeper for some years before his death, but had left him for some time previously to that event. These letters contained promissory notes for large sums of money, and one of the letters stated, that the testator inclosed 200*l.* as a mark of respect; and the other letter stated, that the inclosed was for her long and faithful services. S. G. applied to the executors for payment of the notes; and, upon seeing the notes, they paid her a portion of the amount, and promised to pay the remainder, but afterwards refused to do so:—*Held*, first, that an action was not maintainable by S. G. upon the notes, which were, in effect, a legacy, and an informal one, in not being duly attested as required by the Wills Act, 1 Vict. c. 26, and therefore void; and, secondly, that the action was not maintainable on the account stated, inasmuch as the promise of the executors was made on a supposed debt, which, in fact, was not due. *Gough v. Findon*, 48

LEGACY DUTY.

See DEVISE, (1).

Where a testator, by his will, gives a power to A. B. to appoint to his wife an annuity chargeable upon the land of the testator, if A. B. shall think fit, and A. B. makes the appointment, but with the condition that the wife takes it on relinquish-

ing her dower, legacy duty is payable upon such annuity, under the 45 Geo. 3, c. 28.

Where such condition is annexed by the original testator himself, *quære* whether duty is payable either upon the whole annuity, or upon the amount of it after deducting the value of the dower.

A. B., by his will made in 1821, after disposing of his property in various ways, and after giving directions as to the purchase of estates in the county of S. with the proceeds of estates in the counties of E. and K., directed a deed of settlement of his estates to be executed, and that there should be inserted in such settlement a power to the tenant for life, "and entitled to the rents and profits of the estates so to be settled, by deed or will duly executed, to charge all or any part of such estates with any annual sum or sums of money, not exceeding one-third part of the annual value thereof, unto or for the benefit of any woman or women with whom he or they might respectively happen to intermarry, or with whom he or they might have intermarried, as and for and in the nature of a jointure." Upon the death of A. B. in 1822, C. D. succeeded to the estates; and by his will, in execution of that power, and of all other powers given, charged all the estates he had power to charge "with the payment of the annual sum of 2000*l.*, free and clear from taxes, and without any other deduction whatsoever, unto and for the benefit of his wife Lady H., during the term of her natural life, the said yearly rent or annual sum of 2000*l.* to be in the nature of and in full for the jointure of his said wife, and to be in lieu, bar, and satisfaction of and for her dower or thirds at common law, or by or on account of customary free bench which she could and would or otherwise

of jointure, the deficiency, if any, should be a charge upon, and the said C. D. thereby expressly made liable to, and charged such part and parts of his real estates by his will devised as should not be sold under the trusts in his will contained as thereafter mentioned, with the payment of such deficiency. Upon the death of C. D., the defendant succeeded to the estates as heir-at-law, and entered into possession and receipt of the rents and profits, and made several payments of the annuity to Lady H., the wife of C. D., who was a stranger in blood to A. B.:—*Held*, that legacy duty was payable upon the whole of the annuity, and that the defendant, either as trustee or the person in possession, was the party bound to pay it. *The Attorney-General v. Lord Henniker*, 331

LICENSE.

A parol demise of land reserved to the landlord "all the hedges, trees, thorn bushes, fences, with lop and top:"—*Held*, that such reservation operated as a license to enter the land for the purpose of cutting and carrying away the trees. *Hewitt v. Sir C. Isham*, 77

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mitted that the debt for which the note was given was his own, and was not connected with the partnership accounts. *Cross v. Cheshire*, 43

MORTGAGE.

See LANDLORD AND TENANT, (1).

LEASE.

RAILWAY COMPANY, (3).

STAMP, (1).

(1). *Parol Agreement.*

A mortgage of a personal chattel may be made without deed. *Flory v. Denny*, 581

(2). *Conveyance of Chattels for a Term.*

A., by deed, dated the 28th of September, 1845, conveyed certain goods to B., subject to a proviso, that if he should pay B. the sum thereby secured on the 22nd of March, 1850, or at such earlier day or time as B. should appoint, by giving A. fourteen days' notice, and should pay interest in the meantime half-yearly, the conveyance should be void; and it was thereby agreed between the parties, that, until default should be made in the payment of the principal sum secured at the time therein specified, or the interest, after fourteen days notice, it should be lawful for A., his executors or administrators, to hold and enjoy the chattels. A. continued in possession of the chattels according to the agreement until the 13th of December, 1849, when he became bankrupt; and his assignees (the defendants) on the 19th of February, 1850, sold the whole of the chattels absolutely, and not merely the bankrupt's interest in them. No demand had been made on A. by B., or by the plaintiffs (the assignees of B.), for the principal money or interest in the meantime:—*Held*, first, that the deed did not give a mere possession and

use of the goods to A., as bailee or tenant at will, but the right of possession and use for the term ending the 22nd of March, 1850, defeasible by nonpayment of the principal or of the interest, according to the terms of the deed; but, secondly, that the sale by the assignees of A., the bankrupt, destroyed the bailment; and, thirdly, that the sale by the assignees was equivalent to a sale by the bailee himself; and consequently, that trover would lie by the assignees of the mortgagee against the assignees in bankruptcy of the mortgagor, for the conversion by the sale of the goods during the term. *Fenn v. Bittleston*, 152

(3). *By Trustees for constructing Dock.*

By the 7 & 8 Vict. c. lxxix. certain persons were incorporated as Commissioners, for the purpose of "constructing Tidal Basins, a Dock, and other works at Birkenhead;" and by the 11 & 12 Vict. c. cliv. certain trustees were substituted for these Commissioners; and the property which was vested in the Commissioners by virtue of the former Act was, by the subsequent Act, vested in the trustees. By the 39th section of the former Act, the Commissioners were empowered to borrow at interest, on the credit of the several rates and tolls by that Act granted, and of any property which might be vested in the Commissioners *by virtue of that Act*, any sums of money, so that the amount owing by them did not at any one time exceed a certain specified sum; and for securing the repayment of the monies so borrowed, the Commissioners might assign over the said rates, tolls, and property to the person who should advance or lend such money, as a security for the money so borrowed. By the 40th

By section 57, the Commissioners were empowered to purchase certain lands, and to agree with the parties interested in such lands for the purchase for a consideration in money, &c. After a portion of the works had been completed, the trustees, who were indebted to their contractor for the execution of a part of the works, by two several indentures assigned to him by way of mortgage all the plant, goods, machinery, and working materials in use in and about the docks. These deeds were not in the form given by the Act, nor were they registered:—*Held*, that, as the property assigned by these deeds was not such property as that contemplated by the 39th section of the first Act, but was property to which the trustees were entitled independently of the Act, the trustees had an absolute control over it, and that the mortgages in question were valid. *McCormick v. Parry*, 355

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Held, the statu as the del 50l. only the dam for the *Joule v.*

NEGLIGENCE.

See CHEQUE.

NEW ASSIGNMENT.

See PLEADING, I. (3).

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See STAMP. (2).

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taken in the precise manner and form prescribed by that statute; and the words "upon the true faith of a Christian" are a substantive part of the oath itself, and not merely part of the ceremony for administering the oath. —Per *Pollock*, C. B., *Parke*, B., and *Alderson*, B.; dissentiente *Martin*, B.

Therefore, a person of the Jewish persuasion, who is elected a Member of the House of Commons, and takes his seat as such after having taken the oath in the form binding on his conscience, but intentionally omitting the words "upon the true faith of a Christian," is liable to the penalties which are imposed by the 1 Geo. 1, st. 2, c. 13, s. 17, on any person taking his seat in the House without having first taken the oath of abjuration.

Held, per totam Curiam, secondly, that no exemption from taking the oath was created in favour of Jews by 10 Geo. 1, c. 4.

Thirdly, that the form of the oath is not affected by the 1 & 2 Vict. c. 105; and,

Fourthly, that, though the form of the oath, as given by the 6 Geo. 3, c. 53, mentions the name of "King George" only, the oath is not confined to sovereigns of that name, but the name is used merely by way of describing the existing sovereign; and therefore the form must be altered from time to time by the substitution of the name of the sovereign reigning at the time when the oath is taken. *Miller v. Salomons*, 475

OVERSEER.

See BOROUGH RATE, (1).

PARTIES TO ACTION.

(1). *Surviving Trustee.*

The defendant being in possession

of certain premises under a lease from two trustees for a term which had expired, a new lease was granted for a further term, but was executed by one of the trustees only. The defendant paid rent to both trustees until one of them died; and for the rent due after his death the other trustee brought an action for use and occupation:—*Held*, that he might maintain the action in his own right, and was not bound to sue as surviving trustee. *Sir Henry Wheatley v. Boyd*, 20

(2). *Members of Joint-stock Company.*

The plaintiffs, who were members of a Joint-stock Company which dealt in salt, and the defendant entered into a written agreement, to the effect that the Company were to supply the defendant with brine at a certain sum; that the Company's make of salt and the price were to be fixed according to a certain standard; and that either the Company or the defendant were to be at liberty to cease to supply or to take the salt, upon giving a notice to that effect. This agreement was signed thus: "For Clay & Newman (the plaintiffs) J. W. Lee;" "J. S." (the defendant). It appeared that the salt was supplied from the premises of the Company:—*Held*, that the plaintiffs had themselves entered into this contract with the defendant; and that they were entitled to sue him for a breach of it in their own names. *Clay v. Southern*, 717

PARTNERSHIP.

See ARBITRATION, (2).
MONEY PAID, (2).

PATENT.

In an action for the infringement of a patent, the declaration stated that, in November, 1847, letters pa-

1848, S., by leave of the Solicitor-General, disclaimed the following part of the title of the invention "and the apparatus to be used therein;" which disclaimer was filed by the clerk of the patents, pursuant to the statute.—Breach, that, after the disclaimer was so filed, the defendant put in practice the invention. One plea, after setting out the specification, concluded with a special traverse, that S. enrolled a specification of his said invention. Another plea denied that the disclaimer was filed pursuant to the statute. At the trial, it appeared that, formerly, gelatine was manufactured by submitting the cuttings of hides to the action of caustic alkali, or by reducing them to pulp in a paper machine, and employing blood to purify the product; and that the invention of S. consisted in reducing the hides to shavings, and treating them as thus described in his specification:—"I take the parts of hides, usually called 'glue pieces,' and my process commences by reducing the whole into shavings or thin slices or films by any suitable instrument. The instrument I have used has been an ordinary carpenter's plane, the shaving being cut from the edges of the hide; but it will be

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third issue, since the specification in fact described an apparatus, and the objection that it was not new could not be raised under that form of plea. *Wallington v. Dale*, 888

PAYMENT.

The defendant, being indebted to the plaintiff on a bill of exchange for 25*l.*, and being unable to pay the full amount, left 9*l.* 10*s.* in cash, and a bill for 17*l.* in renewal of the balance at the plaintiff's house in discharge of the debt. A few days afterwards he met the plaintiff, who then refused to take the bill in renewal, and stated that he should retain the cash as payment of another debt, which he said was due. The defendant then demanded back the money in addition to the bill; but the plaintiff refused to return it. The plaintiff shortly afterwards sued the defendant on the original bill:—*Held*, per *Pollock*, C. B., and *Platt*, B., that, under the circumstances, the receipt and retainer of the money by the plaintiff was evidence of payment. Per *Parke*, B., and *Martin*, B., that it did not amount to a payment, but to a set-off. *Thomas v. Cross*, 728

PETITIONING TRADER.

See *INSOLVENT DEBTOR*, (2), (4).

PLEADING.

See *EVIDENCE*, (4).

FACTORY ACT.

FOREIGN JUDGMENT.

INSOLVENT DEBTOR, (4), (5).

PATENT.

I. DECLARATION.

(1). *Special Account stated.*

A declaration stated that the defendant was indebted to the plaintiffs in divers unliquidated debts,

namely, for so much as the plaintiffs deserved to have of the defendant for work done by the plaintiffs as attorneys for the defendant; that the plaintiffs alleged that the said debts amounted to 17*l.* 9*s.* 8*d.*, and the defendant to 147*l.*; that it was agreed that the dispute between them should be put an end to, and the amount of the debts fixed at 150*l.*; that the plaintiffs should relinquish their claim to the residue; and that the debts should be satisfied upon the terms of the defendant agreeing to pay the plaintiffs 150*l.*; that the disputes were ended; that the debts were agreed and fixed at 150*l.*; that the plaintiffs had not made any further claim; and that the debts were satisfied upon the terms in that behalf. Breach, non-payment of 150*l.* Plea, that the plaintiffs did not, "one calendar month before the commencement of this suit, deliver to the defendant a signed bill:"—*Held*, that the declaration, at the best, amounted to a special count on an account stated, and that the plea was good in form and substance. *Bridgman v. Dean*, 199

(2). *Description of Locus in quo*—By Name.

A declaration in trespass qu. cl. fr. stated, that the defendant broke and entered "certain lands of the plaintiff covered with water, being the bed and channel of the river T., and under the same, in the several parishes of L. and L., in the county of G.:"—*Held*, on special demurrer, that the declaration sufficiently described the locus in quo by name. *The Duke of Beaufort v. Vivian*, 580

(3). *Abuttals.*

In actions for trespass to land, the locus in quo should be designated by abuttals, or other description, as it

was at the time of the trespass, and not at the time of declaration. Therefore, where, in an action by a reversioner, the declaration described the locus in quo as "abutting on the south and east on a close in the occupation and possession of the defendants;" and the defendants (a Railway Company), pleaded, that they took possession of part of the said close, abutting on the south on the fence of their railway, under the provisions of the 8 & 9 Vict. c. 20, ss. 32, 33, which was the trespass complained of; and it appeared at the trial, that, at the time the trespass was committed, the close in question abutted on the fence of the railway, but that afterwards the defendants took possession of and purchased, under the provisions of the above Act, a small part of it adjoining the railway, so that the plaintiff's description was correct at the time of declaration, but not at the time of the trespass:—*Held*, that the plaintiff could not recover, for want of a new assignment. *Humfrey v The London and North-Western Railway Company*, 325

II. PLEA.

(1). *Argumentative Denial of Bailment.*

To an action on the case, in which

unless their contents were declared; and that the contents of this package were not declared; and that the defendants did not consent to be responsible contrary to the terms of such notice.—*Verification*:—*Held*, that the plea amounted to an argumentative denial of the bailment as alleged in the declaration. *Crouch v. The London and North Western Railway Company*, 705

(2). *Under the 11 Geo. 2, c. 19, s. 1.*

To a declaration in trespass for breaking and entering a close of the plaintiff called the stable, and breaking the doors thereof, and for seizing and carrying away divers goods and chattels of the plaintiff therein, the defendant pleaded under the 11 Geo. 2, c. 19, s. 1, that, at the time when the trespasses were committed, one O. O. was tenant of certain premises to the defendant at a certain rent, and that half a year's rent was then due to the defendant from the said O. O., and in arrear and unpaid; and that, within thirty days before the said time when &c., O. O. fraudulently and clandestinely conveyed from the premises held by him as such tenant, the goods and chattels in the declaration mentioned, being the greater goods and chattels of the

seize and take the said goods and chattels as a distress for the said arrears of rent so due, and did at the time when, &c., and within thirty days after the said goods and chattels had been so conveyed as aforesaid, seize them as a distress for the said arrears of rent; and that, because on that occasion the said goods and chattels were put and kept in the close locked up, so as to prevent them from being seized as a distress for the said arrears of rent, and so that the defendant could not, without breaking open and entering the said close, seize the said goods, the defendant was obliged and did, in order to seize the said goods, first calling to his assistance the constable of the place where the said close and goods were, according to the form of the statute, and with his aid and assistance, in the day-time break open and enter the said close, in order to seize the said goods and chattels for the said arrears of rent, according to the statute; and that the defendant in so doing did no unnecessary damage, &c.

Held, first, that although it was stated in the plea that the goods were the tenant's at the time of the *removal*, it admitted them to be the plaintiff's at the time of the *seizure*, as averred in the declaration, and therefore that the plea was not objectionable in form, as amounting to an argumentative traverse that at the time of the trespass they were the goods of the plaintiff.

Held, secondly, that the plea afforded a good *prima facie* defence to the action within the 11 Geo. 2, c. 19, s. 1. It is unnecessary, in a plea framed under this statute, to shew that the goods have not been made the subject of a *bonâ fide* sale to persons not privy to the fraudulent removal, as provided by the 2nd sect.; that fact must be replied.

It is also unnecessary to state in

the plea that the party upon whose land the goods are seized is privy to the fraud; and a previous request is unnecessary, in order to give the landlord the right to break into the premises for the purpose of seizing the goods. *Williams v. Roberts*, 618

(3). *To Damage.*

A declaration stated, that, by a deed between B. of the first part, the defendants of the second part, and the plaintiff of the third part, after reciting that B. had been appointed collector of poor rate for the parish of D., and that he had been required to find security for the faithful discharge of his duties, and that the defendants had consented to give such security, the defendants as surety did covenant with the plaintiffs that B. should at all times, whilst he continued in his said office, faithfully account for all sums which he should receive: And the defendants further covenanted, "that a certificate under the hand of the auditor of the district, stating the amount of loss, should be conclusive evidence against the defendants of the truth of the certificate, and that the policy had become forfeited thereby to the amount of the loss stated in such certificate, and should form a valid and binding charge and claim against the defendants, without any further or other proof being given by the plaintiffs in any action of the amount of such loss; or that the same had been occasioned through the default of B. The declaration then averred, "that, after the making of the deed, B. received divers monies which he did not account for, and that the auditor certified that a loss had been occasioned to the plaintiffs by means of the premises to the amount of 800*l.*, and alleged as a breach the



ed at the office of the defendants a certain statement in writing, containing a declaration, signed by the plaintiff, of the truth of the answers thereby given to the questions therein contained. This statement contained (amongst others) the following questions and answers:—"First. Is the applicant at present in your employment, and, if so, in what capacity; and has he hitherto performed the duties of his situation faithfully, and to your satisfaction?—He is secretary of the Marylebone Literary Institution. Secondly. Is the applicant personally known to you or any of your firm; or by whom has he been introduced or recommended to you?—Only as above. Thirdly. In what capacity do you intend to employ the applicant? and, with reference to this question, state, as far as circumstances will permit, (A.) the nature of his intended duties and responsibilities?—(A.) He is secretary of the Marylebone Literary Institution, of which I am treasurer. (C.) The checks, which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed?—(C.) Examined by finance committee every fortnight. (D.) The salary or emolument which will be paid to him, and how and when it will be paid?—(D.) 80*l*. a year, at present:—*Held*, that the statement that the accounts would be examined by the finance committee every fortnight did not amount to a warranty, but was a mere representation of the intention of the plaintiff; and, consequently, that he was entitled to recover in respect of a loss arising from the want of integrity of W., although such loss was occasioned by the neglect to examine the accounts in the manner specified. *Benham v. The United Guarantie and Life Assurance Company*, 744

POOR RATE.

Houses within Precincts of Gaol.

Three houses, situated beyond the actual wall of a county gaol, but within its precincts, were appropriated to the occupation of the governor and of two of the warders of the gaol, respectively, and they inhabited these houses solely as officers of the gaol. The house of the governor had an internal communication with the gaol, but the other houses had no communication with it, except by means of the principal entrance of the gaol:—*Held*, that the occupier of each of these houses was exempt from liability to be assessed to the poor rate, on the ground that the houses were virtually part and parcel of the gaol.

On the hearing of a special case in an appeal stated for the opinion of one of the superior Courts, under the 12 & 13 Vict. c. 45, s. 11, the counsel for the party in support of the rate is entitled to begin.

Upon such hearing, the Court refused to hear more than one counsel upon either side. *Justices of Bedfordshire, Appellants, v. Churchwardens &c. of St. Paul, Bedford, Respondents*, 650

POWER.

See DEVISE, (2).

PRACTICE.

See ARBITRATION, (1).

ATTACHMENT, 2.

CERTIORARI.

COUNTY COURT, (2), (3).

DAMAGES.

INSPECTION OF DOCUMENTS.

PLEADING, II. (4).

POOR RATE.

SEQUESTRATION.

(1). *Staying Proceedings*.

The Court will not stay proceedings

rity for costs to be given by a plain-
tiff, who is a foreigner and usually
resident abroad, if at the time he is
actually in this country. *Tambisco*
v. Pacifico, 816

(3). *Judgment as in Case of a Non-*
suit.

1. It is no answer to a motion for
judgment as in case of a nonsuit, that
the defendant prevented the trial by
injunction, which has since been dis-
solved; at all events, where the plain-
tiff has subsequently given a fresh
notice of trial. *Dobson v. Brockle-*
bank, 316

2. A defendant is not entitled to
judgment as in case of a nonsuit,
where the plaintiff, after issue joined,
has taken the benefit of the Insolvent
Act, and inserted in his schedule the
debt for which the action is brought,
but it does not appear whether the as-
signees are willing to proceed. *Gavin*
v. Allan, 306

(4). *Notice to produce Document at*
Trial.

The true principle on which a no-
tice to produce a document on the
trial of a cause is required, is, not to
give the opposite party notice that
such a document will be used by a
party to the cause, in order to enable
him to prepare evidence to explain or

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tion absolute. The plaintiff then brought an action upon the original judgment. The Court, under the preceding circumstances, refused to order satisfaction to be entered up on the judgment roll in the action.
Ward v. Broomhead, 726

PREScription.

See SURVEYOR OF HIGHWAYS.

PRINCIPAL AND AGENT.

Where a person describes himself in a written instrument as the agent of an unnamed principal, it is competent for the party with whom he contracts to shew that, although described as agent, he is in fact the principal.

A charter-party contained the following clause:—"This charter-party being concluded by C. T. J. (the defendant) on behalf of another party resident abroad, it is agreed that all liability of the former ceases as soon as he has shipped the cargo;" it was shewn that the defendant had paid for the goods in his own name, and that, at the port of destination, they had been claimed by and delivered to a person who produced an unsigned bill of lading, which the captain had delivered to the defendant.

Held, that there was no evidence that the defendant acted as principal, so as to render him liable for the freight. *Carr v. Jackson*, 382

PRIVILEGE.

See ARREST.

PRIVILEGED COMMUNICATION.

See ATTORNEY, (3).

PROMISSORY NOTE.

See ATTORNEY, (3). 1.

BILL OF EXCHANGE.

LEGACY.

STATUTE OF LIMITATIONS, (1), (2).

RAILWAY COMPANY.

See ARBITRATION, (3).

CARRIER, (1).

EVIDENCE, (5).

PLEADING, II. (1), (5).

(1). *Use and Occupation where Contract not under Seal.*

An incorporated Railway Company agreed by parol to take certain premises for a year. They occupied, and at the end of the year continued to occupy for another year, at the expiration of which period they removed their goods, without any previous notice to quit, but paid rent up to the end of the following quarter:—*Held*, that they were not liable in an action for use and occupation for the remaining three quarters of a year, since they did not occupy during that period; and that no tenancy could be inferred from the payment of rent, inasmuch as they could not contract except under seal. *Finlay v. The Bristol and Exeter Railway Company*, 409

(2). *Liability of Provisional Committee.*

In an action by an engineer against a provisional committeeman of a Railway Company, it appeared that, at a meeting of the committee, at which the plaintiff was present, it was resolved, "that the provisional committee disclaim the intention of taking on themselves any personal responsibility as regards the expenses incurred or to be incurred in or about the Company, and that no such responsibility shall attach to them." At

ject were successful, the engineers were to abandon all claim; but he did understand, that the individuals comprising the committee were not to be held personally liable." At a subsequent meeting of the committee, it was resolved, "that the committee bind themselves to be answerable to the extent of 1000*l.*, to be applied to engineering and surveying purposes." The scheme was abandoned, and deposits to the amount of 4168*l.*, which had been received by the committee, were returned to the shareholders:—*Held*, that the defendant was not responsible, the contract being that the plaintiff should be paid out of such funds as could be properly applied in satisfaction of his claim, and there were no funds of that description. *Landman v. Entwistle*, 632

(3). *Mortgage Debentures.*

The 7 & 8 Vict. c. lxxxv. (19th July, 1844), "for making a railway from Colchester to Ipswich," empowered the Company to borrow money on mortgage. Section 49 enacted, "that the Company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereof; and in such case the Company shall cause such period to be inserted in the mortgage deed or bond; and, upon the expira-

form given in a schedule to the 7 & 8 Vict. c. lxxxv., which was the same form as Schedule C. in the Companies Clauses Consolidation Act. By this instrument, the Company assigned to the plaintiffs "the undertaking and all tolls and sums of money" arising by virtue of the 10 & 11 Vict. c. ccxxv., to hold until the 1000*l.*, with interest at 5*l.* per cent., was satisfied; *the principal sum to be repaid on the 1st January, 1851.*"

Held:—First, that, regarding the instrument without reference to the above enactments, the stipulation for payment of the principal on the day named therein imported a covenant on the part of the Company to pay on that day, for the breach of which an action would lie against them; and that such right of action was not taken away or affected by the special Acts, or by the Companies Clauses Consolidation Act, since the 51st and 52nd sects. of the 7 & 8 Vict. c. lxxxv. did not give the right of action, but merely recognised it as already existing, and provided an additional remedy by the appointment of a receiver, and therefore its repeal did not affect the right, which was also recognised by the 53rd sect. of the Companies Clauses Consolidation Act; and consequently, a plea, that the Company had borrowed other sums on mortgage, and had not sufficient funds to satisfy the mortgagees, was bad on demurrer.

Secondly.—That the effect of the instrument was to pledge the tolls and property of the Company as proprietors, but not their stock or property as carriers, or the soil of the railway itself; and that the judgment in an action against them for the principal money would be satisfied out of their general property belonging to them as carriers or otherwise. *Hart v. The Eastern Union Railway Company,*

246

(4). *Mileage Tolls.*

By an agreement made between "The Manchester, Bolton, and Bury Railway Company," and "The Bury and Rossendale Railway Company," it was agreed: "first, that they would mutually concur, at the expense of the Bury and Rossendale Company, in obtaining an Act of Parliament for a line of railway from the Manchester and Bolton Railway to Bury and Rawtenstall: secondly, that the Bury and Rossendale Railway Company should have the use of the Manchester and Bolton Company's station at Salford, but not to impede the Manchester and Bolton Company's traffic, paying such charge for such requisite additional accommodation to the same, arising from the traffic of the Bury and Rossendale Company, as any three indifferent persons, to whom it should be referred in the usual way, should determine: thirdly, that the traffic of the Manchester, Bury, and Rossendale Company, whether of passengers, merchandise, or coal, (that is, traffic using both lines or any portions thereof,) between Salford and Rawtenstall, or any points intermediate to these, should be carried on, as respects engine-power and carriages, clerks and porters, and all other expenses (except the maintenance of the Manchester and Bolton Railway), at the costs and charge of the Bury and Rossendale Railway Company, who should pay to the Manchester and Bolton Railway Company, for the use of their railway, and in respect to the traffic therein specified, a pro rata proportion (according to the distance passed over the two lines respectively) of all and singular the gross rates, tolls, and proceeds arising from the said traffic: with this proviso, that nothing therein contained nor elsewhere

therein, the Manchester and Bolton Railway Company should be entitled to charge, for the use of such portion of their railway, for a length of two miles at the least." After the making of this agreement, the Manchester, Bolton, and Bury Railway Company was incorporated with the Manchester and Leeds Railway Company, and ultimately became "The Lancashire and Yorkshire Railway Company;" and the Bury and Rossendale Railway Company became "The Manchester, Bury, and Rossendale Railway Company," and, having been extended to certain other places, became "The East Lancashire Railway Company;" and, by subsequent Acts of Parliament, certain other railways were incorporated with it, so as to form an extensive line of railway. A special verdict having found that the length of the Manchester, Bolton, and Bury Railway, from the station at Salford to its point of junction with the Manchester, Bury, and Rossendale Railway at Clifton, was four miles and no more:—*Held*, first, that, on the true construction of the above agreement, the Lancashire and Yorkshire Railway Company were not entitled to charge the East Lancashire Railway Company that proportion

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quently, there was a holding at a rent of 400*l.*, as alleged in the avowry. *Meggison v. Lady Glamis, Sells v. Same*, 685

(2). *Date in Avowry when Rent due.*

An avowry for rent stated, that the plaintiff held the premises of the defendant at a certain rent, to wit, the yearly rent of 80*l.*; and because a large sum, to wit, the sum of 80*l.* of the rent aforesaid for a certain time, to wit, one year ending on the 29th of September, A. D. 1851, was due and in arrear, &c., and then justified the distress for rent in arrear:—*Held*, that the date in the avowry was material; and therefore that the avowry was not supported by proof of some rent being due and in arrear for a former year. *Roskrige v. Caddy*, 840

ROBBERS.

See CARRIER, (2).

SEQUESTRATION.

Judgment having been signed against the defendant, a beneficed clergyman in the county of Brecon, a writ of sequestration was issued and put in force in the month of August; but at that time no writ of *fi. fa.* whatever had been issued. In October, a writ of *fi. fa.* was issued against the defendant, to which the sheriff of Bristol made a return of *nulla bona* only, and not that the defendant was *clericus beneficiatus*. On the 22nd of November, a rule nisi was obtained to set aside the writ of sequestration:—*Held*, first, that the writ of sequestration was irregular; and secondly, that the rule was moved for in time. *Bromage v. Vaughan*, 223

SHARES.

See JOINT-STOCK COMPANY.

SHERIFF.

See ATTACHMENT, 1.
SEQUESTRATION.

Voluntary Payment to Bailiff of Debt and Costs on Execution of Ca. Sa.

It is no part of the duty of the sheriff, in executing a writ of *ca. sa.*, to receive the amount of the debt and costs, in order to pay them over to the execution plaintiff. And therefore, where the debtor makes a *voluntary* payment to the *bailiff* of the debt and costs, to be paid over to the execution plaintiff, and the bailiff fails to do so, and, in consequence thereof, the debtor is a second time arrested under a fresh writ issued upon the same judgment, the sheriff is not liable as for a breach of duty in not paying over the money to the execution plaintiff.

Semble, that, in such case, the debtor's remedy is by action against the bailiff for breach of contract. *Woods v. Finnis*, 363

SET-OFF.

See PAYMENT.

SHIP.

Where the master of a vessel sells part of a shipper's goods at an intermediate port, in order to raise money to provide for the repairs or other expenses of the vessel, which are necessary to enable him to prosecute and complete the voyage, and the vessel does not arrive at her port of destination, the shipper is not entitled to receive the clear value for which the goods would have sold at that port.

A declaration in *assumpsit* stated, that the defendant was the owner of a certain ship then at a certain foreign port, and bound from thence to the port of London in Great Britain; and that the plaintiff caused certain goods of his to be shipped on board the ship,

raise a sum of money; and that, without doing so, the ship would have been unable to leave the port or to proceed to sea; and that, because the master could not otherwise raise the amount necessarily required, he sold certain of the plaintiff's goods, and with the amount so realised he paid the expenses of the repairs, &c. The declaration then stated, that the defendant, in consideration of the premises, promised the plaintiff to pay him the value for which the goods would have been sold if they had been delivered by the defendant to the plaintiff at London.

Plea to the declaration, so far as the same claims to recover damages to a greater amount than the value of the ship and freight thereafter mentioned, that the plaintiff ought not to maintain his action to recover any damages to a greater amount than aforesaid, because, after the goods were shipped, and before any part thereof had been conveyed to the port of L., and whilst they were in the custody and under the control of the master, the master wrongfully, and without any authority in that behalf from the defendant, and without his knowledge, privity, or consent, sold the goods, and the defendant thereby was unable to deliver them to the plaintiff; and that, at the several times, the defendant was the owner

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case of the avoidance of the policy, or the insolvency of the insurance company, A. would insure in another office, and assign the new policy to the defendant; and that if A. should neglect to pay the premium or insure in some other office, the defendant might do so, and the sums so advanced by the defendant for continuing the insurance or making a fresh policy should be considered as principal monies and bear interest, and the policy should be a security for the repayment thereof, and should not be redeemed without payment to the defendant of the sums so advanced and interest, as well as the 184*l.* 7*s.* 6*d.*:—*Held*, that such mortgage was not “a security for the repayment of money to be thereafter lent, advanced, or paid,” &c., to an amount “uncertain and without limit,” within the Stamp Act, 55 Geo. 3, c. 184, Sched., Pt. I., tit. “Mortgage,” and therefore did not require a 24*l.* stamp. *Laurance v. Boston*, 28

(2). *Newspaper.*

A publication containing public news, printed and published in the United Kingdom, for sale, for less than 6*d.*, exceeding one sheet and not exceeding two sheets of paper of the dimensions of twenty-one inches in length and seventeen inches in breadth (in whatever way or form divided into leaves, or in whatever way printed), and published periodically in parts or numbers, at intervals exceeding twenty-six days, is not liable to stamp duty under the 6 & 7 Will. 4, c. 76, Sched. (A.)—Per *Pollock*, C. B., *Platt*, B., *Martin*, B.; dissentiente *Parke*, B. *Attorney-General v. Bradbury*, 97

STATUTE OF FRAUDS.

See GUARANTEE, (2).

LANDLORD AND TENANT, (2).

STATUTE OF LIMITATIONS.

See ATTORNEY, (2), (3). 1.

(1). *Payment of Interest.*

Payment of interest upon a promissory note payable on demand, is sufficient to take the case out of the Statute of Limitations, although there be no independent evidence that any demand of payment of the note has been made. *Bamfield v. Tupper*, 27

(2). *Payment of Dividend by Order of Insolvent Court.*

One of three joint makers of a promissory note became insolvent, and inserted the note and the holder's name in his schedule, and a dividend was afterwards paid to the holder by order of the Insolvent Court in respect of the note:—*Held*, in an action upon the note, that such payment was not sufficient to take the case out of the Statute of Limitations, either as against the other makers of the note, or as against the insolvent himself. *Davies v. Edwards*, 22

SURRENDER.

See COUNTY COURT, (1).

LANDLORD AND TENANT, (2).

SURVEY.

See EVIDENCE, (2).

SURVEYOR OF HIGHWAYS.

A surveyor of highways cannot justify a trespass under a prescriptive right, or a custom, to take stones from the waste, whether adjoining the sea-shore between high and low water mark, or otherwise, for the purpose of repairing the highways of the parish.

Semble, that it would be a good justification to plead such a prescrip-

tive right in the inhabitants of the parish, alleging that the surveyor was one of the inhabitants. *Padwick v. Knight*, 854

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See REPLEVIN, (1).

TOLL.

See HARBOUR COMMISSIONERS.
RAILWAY COMPANY, (4).

TRESPASS.

See EVIDENCE, (4), (5).
LICENSE.
PLEADING, I. (2), (3).
WARRANT.

TROVER.

See MORTGAGE, (2).

TRUSTEE.

See COUNTY COURT, (5).
DEVISE, (2).
FRIENDLY SOCIETY.
INSOLVENT DEBTOR, (1).
MORTGAGE, (3).
PARTIES TO ACTION, (1).

WARRANT.

Act contained "shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein;" and therefore a bill of exchange payable at three months, at a rate of interest exceeding 5l. per cent. per annum, is valid, although secured by a mortgage on land. *Nixon v. Phillips*, 188

VAGRANT ACT (5 Geo. 4, c. 83).

The Vagrant Act, 5 Geo. 4, c. 83, s. 4, does not render a suspected person frequenting a street with intent to commit felony liable to punishment, unless the street leads to some river, canal, &c., or is itself a place of public resort, or is adjacent to a place of public resort.

Therefore, where a commitment stated that the prisoner, being a suspected person, did on &c. unlawfully frequent a certain street, to wit, Regent-street, with intent to commit felony:—*Held*, that the commitment was bad.

Held, also, that it was no objection to the commitment that it did not state that the prisoner was in the street with intent to commit felony there. *In re Elizabeth Jones*, 586

WARRANT.

Secondly, that *trespass* lay against A. B.

Thirdly, the action not having been brought within six months after the commission of the trespass, that the constable was protected under the 6th and 8th sections of the 24 Geo. 2, c. 44. *Freegard v. Barnes*, 827

WARRANTY.

See POLICY OF GUARANTIE.

WATERCOURSE.

The 33 Geo. 3, c. lxxx. incorporated a Company for making a navigable canal, and enacted, "that before any of the brooks, streams, rivulets, waters, watercourses, or springs, which supplied the rivers Gade or Bulbourne, should be taken for the purposes of the canal, a reservoir should be made for collecting flood-waters, sufficient to supply such rivers with a quantity of water at least equal to what should be taken from the said rivers, brooks, streams, &c., for the use of the intended canal; and that, whenever there should be a want of water in such rivers, for the supply of any mill thereon, a person appointed for that purpose should, at the instance of the occupier of the mill, let off from the reservoir and convey to such river, a supply of water equal at least to the quantity taken above the mill for the use of the canal: provided that, when a sufficient quantity of flood-waters could not be collected for serving the mills with a quantity of water equal at least to what should be taken from them for the use of the canal, the Company should thenceforth cease to take any of the waters of the said rivers, or of the brooks, streams, rivulets, waters, watercourses, or springs which then supplied the same, or any part thereof, for any purpose whatsoever." By

agreement under seal of the 11th of September, 1817, between the Company and the plaintiffs, (who were owners of two ancient mills situate below the junction of the rivers Bulbourne and Gade), after reciting that there had been disputes between the Company and the plaintiffs respecting the subtraction of water from their mills by the said canal, and that, upon mature deliberation, it was admitted by all parties that full security could be obtained for the mill, and an end put to disputes, without the aid of reservoirs, by varying the course of the canal in a track therein referred to, the Company covenanted to endeavour to procure an Act of Parliament to authorise the deviations; and also, that they would not, at any time, make any other alteration in the state of communication between the canal and the rivers Gade and Bulbourne above the higher mill of the plaintiffs, or any diversion of the waters of those rivers, but that the same should continue as then existing. The 58 Geo. 3, c. xvi. accordingly passed, whereby the Company were empowered to vary the line of canal; but it was enacted, that they should not make any alteration in the state of communication between the canal and the rivers Gade and Bulbourne, nor divert any of the waters of the said rivers in any other manner than diverted at the time of the passing of that Act. In the year 1849, the Company sunk a well on their own land, and erected over it a pump and steam-engine, by which they pumped into their summit level a quantity of under-ground water, which would otherwise have flowed under ground into the river Bulbourne, and also a quantity of under-ground water, which would otherwise have percolated the intervening chalk and earth under ground into that river, both of

vening chalk and earth into the well. The plaintiffs were in consequence prevented from working their mills so beneficially as they otherwise might have done:—

Held, first, that at common law the Company were liable to an action for abstracting the water which actually had formed a part of the stream of the rivers Gade and Bulbourne, by sinking the well.

Secondly, that an action would also lie against them at common law, for the abstraction of the water which never did form part of the rivers, but was prevented from doing so in its natural course by the excavation of the well, whether the water was part of an under-ground watercourse, or percolated through the strata.

Thirdly, that the taking away of the water of the rivers, or the supply of the rivers from springs and percolations by means of the well, was a breach of the agreement and of the Acts of Parliament.

Fourthly, that actual loss of profit, by being unable to work the mills as before, was not necessary to enable the mill-owners to recover either at common law or for breach of the agreement. *Dickinson v. The Grand Junction Canal Company*, 282

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